

10TH ANNIVERSARY OF THE CONGRESSIONAL REVIEW ACT

HEARING BEFORE THE SUBCOMMITTEE ON COMMERCIAL AND ADMINISTRATIVE LAW OF THE COMMITTEE ON THE JUDICIARY HOUSE OF REPRESENTATIVES ONE HUNDRED NINTH CONGRESS SECOND SESSION

MARCH 30, 2006

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CONTENTS

MARCH 30, 2006

OPENING STATEMENT

	Page
The Honorable Chris Cannon, a Representative in Congress from the State of Utah, and Chairman, Subcommittee on Commercial and Administrative Law	1

WITNESSES

Mr. J. Christopher Mihm, Managing Director for Strategic Issues, U.S. Government Accountability Office, Washington, D.C.	
Oral Testimony	5
Prepared Statement	7
Mr. Morton Rosenberg, Esq., Specialist in American Public Law, American Law Division of the Congressional Research Service, Library of Congress, Washington, D.C.	
Oral Testimony	19
Prepared Statement	21
Mr. Todd F. Gaziano, Esq., Senior Fellow in Legal Studies, and Director, Center for Legal and Judicial Studies, The Heritage Foundation, Washington, D.C.	
Oral Testimony	23
Prepared Statement	26
Mr. John V. Sullivan, Esq., Parliamentarian, Office of the Parliamentarian, U.S. House of Representatives, Washington, D.C.	
Oral Testimony	38
Prepared Statement	39

APPENDIX

MATERIAL SUBMITTED FOR THE HEARING RECORD

Mr. J. Christopher Mihm, Managing Director for Strategic Issues, U.S. Government Accountability Office, Washington, D.C.: Letter dated May 12, 2006, response to question from the Subcommittee	52
CRS Report for Congress by Mr. Morton Rosenberg "Congressional Review of Agency Rulemaking: An Update and Assessment of the Congressional Review Act After Ten Years"	55

10TH ANNIVERSARY OF THE CONGRESSIONAL REVIEW ACT

THURSDAY, MARCH 30, 2006

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON COMMERCIAL
AND ADMINISTRATIVE LAW,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Subcommittee met, pursuant to notice, at 2:43 p.m., in Room 2141, Rayburn House Office Building, the Honorable Chris Cannon (Chairman of the Subcommittee) presiding.

Mr. CANNON. I'd like to call the Subcommittee to order.

We're here to—by the way, thank you, Howard. Thank you for being here. I want to thank Mr. Coble for being with us to start the hearing.

We're here today to look at the Congressional Review Act, a law passed to provide Congress with a tool in the oversight of administrative rulemaking. In the last 10 years, more than 41,828 rules have been reported to Congress under the Congressional Review Act.

When Congress passes complex legislation, it often leaves many details to the agencies authorized to enforce the laws, and this body must remain vigilant over those details and how they are filled in by the agencies through congressional oversight.

The Congressional Review Act established a mechanism for Congress to review and disapprove Federal agency rules through an expedited legislative process. It requires agencies to report to Congress and to the Comptroller General with information to help us assess the merits of the rules.

Now, today, we have a panel of experts who are here, who are going to be discussing this process in greater detail. As our panel of expert witnesses will attest, there are some areas of the CRA that could be changed to make it a more effective tool for Congress.

Today's hearing is part of the Administrative Law Process and Procedure Project that our Subcommittee is spearheading. The objective of the project is to conduct a nonpartisan, academic analysis of the Federal rulemaking process.

Scholars and experts from academic and legal institutions and organizations across the Nation are involved in this project. The project will conclude with a detailed report, including recommendations for legislative proposals and suggested areas for further research and analysis to be considered by the Administrative Conference of the United States.

As you may recall, my legislation reauthorizing ACUS was signed into law in the fall of 2004. The Administrative Conference is a nonpartisan public think tank—public-private think tank that proposes recommendations, which, historically, have improved administrative aspects of regulatory law and practice.

ACUS served as an independent agency charged with studying the efficiency, adequacy, and the fairness of the administrative procedure used by Federal agencies. Most of the recommendations made by ACUS were implemented and, in turn, helped save taxpayers millions of dollars.

Unfortunately, ACUS has yet to receive appropriated funds. The Congress must fund ACUS so that it can continue to provide valuable recommendations for improving the administrative law process.

Justice Breyer, in his testimony to the Subcommittee, noted that the conference's recommendations resulted in huge savings to the public. Let's work to bring that savings back into reality.

I look forward to testimony from our witnesses.

[The statement of Mr. Cannon follows:]

PREPARED STATEMENT OF OPENING STATEMENT OF THE HONORABLE CHRIS CANNON,
CHAIR, SUBCOMMITTEE ON COMMERCIAL AND ADMINISTRATIVE LAW, FOR THE OVER-
SIGHT HEARING ON THE 10TH ANNIVERSARY OF THE CONGRESSIONAL REVIEW ACT

We are here today to look at the Congressional Review Act, a law passed to provide Congress with a tool in the oversight of administrative rulemaking. In the last ten years, more than 41,828 rules have been reported to Congress under the Congressional Review Act.

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Most of the recommendations made by ACUS were implemented, and, in turn, helped save taxpayers millions of dollars. Unfortunately, ACUS has yet to receive appropriated funds. The Congress must fund ACUS so that it can continue to provide valuable recommendations for improving the administrative law process. Justice Breyer, in his testimony to the Subcommittee, noted that the Conference's recommendations resulted in a "huge" savings to the public. Let's work to bring that savings back into reality.

I look forward to the testimony from our witnesses.

Mr. CANNON. When Mr. Watt arrives, we'll recognize him for an opening statement, if he would like to do that.

And at this point, without objection, all Members may place their statements in the record. Hearing no objection, so ordered.

Mr. CANNON. Without objection, the Chair will be authorized to declare recesses of the hearing at any point. Hearing none, so ordered.

Oh, and at this point, we'd like to recognize Mr. Coble for an opening statement.

Mr. COBLE. Mr. Chairman, I will not give an opening statement. I will commend you for having assembled a very distinguished panel, and I look forward to hearing from them.

I have another meeting, however, simultaneously scheduled. So I will probably be in and out.

But I thank you, Mr. Chairman.

Mr. CANNON. I thank the gentleman.

I ask unanimous consent that Members have 5 legislative days to submit written statements for inclusion in today's hearing record. Without objection, so ordered.

I am now pleased and honored to introduce the witnesses for today's hearing.

Our first witness is Chris Mihm, who is the managing director of GAO's Strategic Issues Team, which focuses on government-wide issues with the goal of promoting a more results-oriented and accountable——

[Pause.]

Mr. CANNON. We would certainly not like this Committee to be interrupted by what happens on the floor of the House.

We were talking about the Strategic Issues Team, which focuses on government-wide issues with the goal of promoting a more results-oriented and accountable Federal Government. The Strategic Issues Team has examined such matters as Federal agency transformations, budgetary aspects of the Nation's long-term fiscal outlook, and civil service reform.

Mr. Mihm is a fellow of the National Academy of Public Administration, and he received his undergraduate degree from Georgetown University.

Our second witness is Mort Rosenberg, a specialist in American public law in the American Law Division of the Congressional Research Service. In all matters dealing with administrative law, Mort has been the Judiciary Committee's right hand. For more than 25 years, he has been associated with CRS and has appeared before this Committee a number of times.

In addition to these endeavors, Mort has written extensively on the subject of administrative law. He obtained his undergraduate degree from New York University and his law degree from Harvard Law School. And we welcome you back Mr. Rosenberg.

Todd Gaziano is our third witness. He is a senior fellow in legal studies and the director of the Center for Legal and Judicial Studies at The Heritage Foundation. Mr. Gaziano has served in all three branches of government.

In the executive branch, he worked at the U.S. Department of Justice in the Office of Legal Counsel during the Reagan, Bush, and Clinton administrations. In the judicial branch, he was a law

clerk in the 5th Circuit Court of Appeals for the Honorable Edith Jones.

And between 1995 and 1997, he was the chief counsel to the House Subcommittee on National Economic Growth, Natural Resources, and Regulatory Affairs. During that time, he was involved in regulatory reform legislation, including the Congressional Review Act of 1996. Mr. Gaziano graduated from the University of Chicago Law School.

Our fourth witness is Mr. John Sullivan, the Parliamentarian for the U.S. House of Representatives. This is an interesting experience to actually testify, isn't it?

Mr. Sullivan has served in the House of Representatives since 1984 as a counsel for the House Armed Services Committee, then as Assistant Parliamentarian and Deputy Parliamentarian before he was appointed as the Parliamentarian by the Speaker during the 108th Congress.

Prior to coming to the Hill, Mr. Sullivan served 10 years in the Air Force. He's a graduate of the U.S. Air Force Academy and earned his law degree from the Indiana University School of Law.

This is only the second time that a sitting Parliamentarian has testified in front of a House Committee. The first was on the same subject a year after the Congressional Review Act was passed. We truly appreciate your testimony today and your taking time out to do this.

Just as a side note, I understand, Mr. Sullivan, that your grandfather was Lefty Sullivan, one of the pitchers for the 1919 White Sox's. I had no idea, thank you. I am guessing that he would have been very happy with the White Sox season last year? That's great.

I extend to each of you my appreciation for your willingness to participate in today's hearing. Because your written statements will be included in the record, I request that you limit your oral remarks to 5 minutes. Accordingly, please feel free to summarize or highlight the salient points of your testimony.

You will note that we have a lighting system. Green means 4 minutes, yellow means 1 minute, and red means you're out of time. Generally, we're pretty loose with that, and depending on whether we have people here to ask questions, we may be more or less loose. But, I want to let you know that it's a travel day for some folks, and so we'd like to pay some attention to that.

After you've presented your remarks, the Subcommittee Members, in the order they arrive, will ask questions of the witnesses, and they'll be subject to the 5-minute limit. And, we're going to be quite strict with that one.

I ask unanimous consent that Members have 5 legislative days to submit additional questions for the witnesses. Hearing no objection, so ordered.

Pursuant to the directive of the Chairman of the Judiciary Committee, I ask the witnesses to please stand and raise your right hand to take the oath.

[Witnesses sworn.]

Mr. CANNON. The record should reflect that all of the witnesses answered in the affirmative. You may be seated.

Mr. Mihm, would you please go ahead with your testimony?

**TESTIMONY OF J. CHRISTOPHER MIHM, MANAGING DIRECTOR
FOR STRATEGIC ISSUES, U.S. GOVERNMENT ACCOUNT-
ABILITY OFFICE, WASHINGTON, D.C.**

Mr. MIHM. Thank you, Mr. Chairman. Mr. Chairman, Mr. Coble, it's indeed, a great honor to appear before you today to discuss the Congressional Review Act.

As you mentioned in your opening statement, Mr. Chairman, the CRA was enacted to ensure that Congress has an opportunity to review and possibly reject rules issued by executive agencies before they become effective. Under the CRA, two types of rules, major and nonmajor, must be submitted to both houses of Congress and GAO before they can be implemented.

Taking your guidance, Mr. Chairman, I'll limit my comments to discussing GAO's role under CRA and the role that the CRA plays in the broader regulatory context. First, on the first point—GAO's primary role under the CRA is to assess and to report to Congress, on each major rule, the relevant agency's compliance with certain prescribed procedural steps.

These requirements include preparation of a cost-benefit analysis when that is required, compliance with the Regulatory Flexibility Act, the Unfunded Mandates Reform Act—commonly known as UMRA, the Administrative Procedures Act, Paperwork Reduction Act, and relevant executive orders, including 12866.

GAO's report must be sent to the congressional committees of jurisdiction within 15 calendar days of the publication of the rule or submission of the rule by the agency, whichever is later.

While the CRA is silent in regard to GAO's role concerning nonmajor rules, we found that the basic information about those rules should also be collected in a manner that can be useful to Congress and the public. Specifically, since the CRA was enacted in 1996, we have received and submitted reports on 610 major rules and entered over 41,000 nonmajor rules into a database that we created and maintain.

To compile information on all of the rules—that is, major and nonmajor—submitted to us under the CRA, we established this database, available to the public through the Internet. Our database gathers basic information about the 15 to 20 major and nonmajor rules that we typically receive each day, including the title, the agency, the type of rule, proposed effective date, date published in the Federal Register, other pertinent information, and any joint resolutions of disapproval that may have been introduced.

Each year, we also seek to determine whether all final rules covered by the CRA and published in the Federal Register have been filed with both Congress and us. We do this review to both verify the accuracy of our database and to determine if agencies are complying with the CRA.

We forward a list of unfulfilled rules to OMB for their handling, and in the past, they have disseminated the list to the agencies, most of which file the rules or offer an explanation of why they do not believe the rule is covered by the CRA.

In the 10 years since the CRA was enacted, all major rules have been filed with us in a timely fashion. For nonmajor rules, the degree of compliance has remained fairly constant, but not as high, with roughly 200 nonmajor rules per year not filed with our office.

And, they're the ones that we have to go after and go back to OIRA on.

One major area of noncompliance with the CRA's requirements has been that agencies have not always delayed the effective date of the major rules for the required 60 days. More specifically, agencies did not delay the effective date for 71 of the 610 major rules filed with our office.

My written statement contains the agencies' explanation for that, and as I note in the statement, we don't view those as valid explanations.

My second broad point this afternoon is that agencies and GAO have provided Congress a considerable amount of information about the forthcoming rules in response to the CRA. The limited number of joint Congressional resolutions might suggest that this information generates little additional oversight of rulemaking.

However, as we have found in our review of the information generated on Federal mandates under UMRA, the benefits of compiling and making information available on potential Federal actions should not be underestimated. Further, as we've also found regarding UMRA, the availability of procedures for congressional disapproval may have some deterrent effect.

My good CRS colleague Mort Rosenberg has reported that several rules have been affected by the presence of the review mechanism, suggesting that the CRA review scheme does have some influence in helping Congress maintain some transparency and oversight of the regulatory process.

Let me add my statement at that point, Mr. Chairman, and I am happy to take any questions that you or any other Members of the Subcommittee may have.

[The prepared statement of Mr. Mihm follows:]

PREPARED STATEMENT OF J. CHRISTOPHER MIHM

GAO

United States Government Accountability Office

Testimony

Before the Subcommittee on Commercial
and Administrative Law, Committee on
the Judiciary, House of Representatives

For Release on Delivery
Expected at 2 p.m. EST
Thursday, March 30, 2006

FEDERAL RULEMAKING

Perspectives on 10 Years of Congressional Review Act Implementation

Statement of J. Christopher Mihm,
Managing Director, Strategic Issues



GAO-06-601T

GAO
accountability integrity transparency

Highlights

Highlights of GAO-06-601T, testimony to the Subcommittee on Commercial and Administrative Law, Committee on the Judiciary, House of Representatives

Why GAO Did This Study

This year marks the 10th anniversary of the Congressional Review Act (CRA). Congressional oversight of rulemaking using the CRA can be an important and useful tool for monitoring the regulatory process and balancing and accommodating the concerns of American citizens and businesses with the effects of federal agencies' rules. This statement provides an overview of the purpose and provisions of CRA, GAO's role and activities in fulfilling its responsibilities under the Act, and trends on CRA within the broader context of developments in presidential and congressional oversight of federal agencies' rulemaking.

www.gao.gov/qa/fin/qa06/06-601T

To view the full product, click on the link above. For more information, contact Christopher Munn at (202) 512-6806 or munn@gao.gov.

March 30, 2006

FEDERAL RULEMAKING

Perspectives on 10 Years of Congressional Review Act Implementation

What GAO Found

CRA gives Congress an opportunity to review most rules before they take effect and to disapprove those found to be too burdensome, excessive, inappropriate, duplicative, or otherwise objectionable. Under CRA, two types of rules, major and nonmajor, must be submitted to both Houses of Congress and GAO before they can take effect. The Office of Information and Regulatory Affairs (OIRA) of the Office of Management and Budget specifies which rules are designated as major rules based on criteria set out in the CRA. Major rules cannot be effective until 60 days after publication in the *Federal Register* or submission to Congress and GAO, whichever is later. Congress may disapprove agencies' rules by introducing a resolution of disapproval that, if adopted by both Houses of Congress and signed by the President, can nullify an agency's rule. Members of Congress seldom have attempted to use this process.

GAO's role under CRA is to provide Congress with a report on each major rule concerning GAO's assessment of the promulgating federal agency's compliance with the procedural steps required by various acts and executive orders governing the regulatory process. GAO compiles information on the rules it receives under CRA in a database containing basic information about major and nonmajor rules. GAO also conducts an annual review to determine whether all final rules covered by the Act and published in the *Federal Register* have been filed with the Congress and GAO. Although we reported that agencies' compliance with CRA requirements was inconsistent during the first years after CRA's enactment, compliance improved over time.

There have been a limited number of CRA joint resolutions, but the benefits of compiling and making information available on potential federal actions should not be underestimated. The procedures for congressional disapproval also may have some deterrent effect. Efforts to enhance presidential oversight of agencies' rulemaking appear to have been more significant and widely employed in recent years than similar efforts to enhance congressional oversight. Some recent legislative proposals have focused on expanding the information and analysis available to Congress on pending rules, while others focus on enhancing the mechanisms that Congress could employ for its own review—and potential disapproval—of agencies' rules.

Facts on CRA since its Enactment on March 29, 1996

- 37 Joint Resolutions of Disapproval introduced affecting 28 rules
- 1 rule nullified by Congress through Joint Resolution procedures
- 610 major rules received and reported on by GAO
- 41,218 nonmajor rules entered into GAO database
- About 200 nonmajor rules per year not filed with GAO
- All 610 major rules filed with GAO in a timely fashion
- 71 of 610 major rules—effective date not delayed for required 60 days

Mr. Chairman and Members of the Subcommittee:

I am pleased to appear before you today on the 10th anniversary of the enactment of the Congressional Review Act (CRA).¹ As you know, CRA was enacted to ensure that Congress has an opportunity to review, and possibly reject, rules before they become effective. Under CRA, two types of rules, major and nonmajor, must be submitted to both Houses of Congress and GAO before they can take effect. We are required to provide Congress with a report on each major rule concerning our assessment of the promulgating federal agency's compliance with the procedural steps required by various acts and executive orders governing the regulatory process.

Over the past 10 years, agencies have submitted information on thousands of rules as required by the CRA. Although we generally found that agencies complied with CRA's requirements, one main area of noncompliance has been that agencies have not always delayed the effective date of their major rules for 60 days, as required by the Act. While considerable information on agencies' rules has been reported under CRA, to date Congress has used the Act to disapprove only one rule, the Department of Labor's rule on ergonomics in 2001. In contrast, our reviews indicated that efforts to increase presidential influence and authority over the regulatory process have become more significant and widely used over the years.

In my statement today, I will focus on three topics. First, I will provide a quick overview of the purpose and provisions of CRA. Second, I will discuss GAO's role in fulfilling its responsibilities under the Act and summarize our CRA activities over the years. Finally, I will address CRA within the broader context of developments in presidential and congressional oversight of federal agencies' rulemaking. My statement is based on our activities and observations implementing our responsibilities under CRA over the past decade and our related body of work reviewing federal regulatory issues.

¹5 U.S.C. §§ 801-808. CRA was enacted as Subtitle E of the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), Pub. L. No. 104-121, on March 29, 1996.

Overview of CRA Purpose, Procedures, and Requirements

Congressional oversight of rulemaking using the CRA can be an important and useful tool for monitoring the regulatory process and balancing and accommodating the concerns of American citizens and businesses with the effects of federal agencies' rules. As we noted early in the implementation of CRA, it is important to assure that executive branch agencies are responsive to citizens and businesses about the reach, cost, and impact of regulations, without compromising the statutory mission given to those agencies.² CRA seeks to accomplish this by giving Congress an opportunity to review most rules before they take effect and to disapprove those found to be too burdensome, excessive, inappropriate, duplicative, or otherwise objectionable.

With certain exceptions, CRA applies to most rules issued by federal agencies, including the independent regulatory agencies.³ Under CRA, two types of rules, major and nonmajor, must be submitted to both Houses of Congress and GAO before they can take effect. CRA defines a "major" rule as one which results or is likely to result in (1) an annual effect on the economy of \$100 million or more; (2) a major increase in costs or prices for consumers, individual industries, government agencies, or geographic regions; or (3) significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of U.S.-based enterprises to compete with foreign-based enterprises in domestic and export markets. CRA specifies that the determination of what rules are major is to be made by the Office of Information and Regulatory Affairs (OIRA) of the Office of Management and Budget (OMB). Major rules cannot be effective until 60 days after publication in the Federal Register or submission to Congress and GAO, whichever is later. Nonmajor rules become effective when specified by the agency, but not before they are filed with Congress and GAO.

CRA established a procedure by which members of Congress may disapprove agencies' rules by introducing a resolution of disapproval that, if adopted by both Houses of Congress and signed by the President, can nullify an agency's rule. If such a resolution becomes law, the rule then

²GAO, *Congressional Review Act*, GAO/T-OGC-97-20 (Washington, D.C.: Mar. 6, 1997).

³In addition to some general exceptions, such as one regarding any rule relating to agency management or personnel, CRA does not apply to any rule promulgated under the Telecommunications Act of 1996 and the amendments made by that Act. Nor does CRA apply to rules that concern monetary policy proposed or implemented by the Board of Governors of the Federal Reserve System or the Federal Open Market Committee.

cannot take effect or continue in effect. In addition, CRA prohibits an agency from reissuing such a rule in substantially the same form, or a new rule that is substantially the same as the disapproved rule, unless the reissued or new rule is specifically authorized by a law enacted after the date of the joint resolution disapproving the original rule. Members of Congress seldom have attempted to use this disapproval process. Over the past decade, 37 joint resolutions of disapproval have been introduced regarding 28 rules. Only once has Congress used this disapproval process to nullify a rule, when it disapproved the Department of Labor's rule on ergonomics in 2001.⁴

GAO's Role and Activities under CRA

GAO's only stated role under CRA is to provide Congress with a report on each major rule concerning GAO's assessment of the promulgating federal agency's "compliance with the procedural steps" required by various acts and executive orders governing the regulatory process. These include preparation of a cost-benefit analysis, when required, and compliance with the Regulatory Flexibility Act, the Unfunded Mandates Reform Act of 1995 (UMRA), the Administrative Procedure Act (APA), the Paperwork Reduction Act, and Executive Order 12866. GAO's report must be sent to the congressional committees of jurisdiction within 15 calendar days of the publication of the rule or submission of the rule by the agency, whichever is later. While the CRA is silent with regard to GAO's role concerning nonmajor rules, we found that basic information about those rules also should be collected in a manner that can be of use to Congress and the public.

To compile information on all the rules submitted to us under CRA, we established a database, available to the public on the Internet.⁵ Our database gathers basic information about the 15–20 major and nonmajor rules that we receive each day, including the title, the agency, the Regulation Identification Number, the type of rule, the proposed effective date, the date published in the Federal Register, the congressional review trigger date, and any joint resolutions of disapproval that may have been introduced. We created a standardized submission form available on the Internet, which is used by almost all the agencies, to allow more consistent

⁴Pub. L. No. 107-5, 115 Stat. 7 (Mar. 20, 2001).

⁵GAO's Federal Rules Database is publicly available at www.gao.gov under the "Legal Products" link. The reports we prepare on major rules under CRA are also available on that site.

information collection. Since CRA was enacted on March 29, 1996, we have received and submitted timely reports on 610 major rules and entered 41,218 nonmajor rules into the database.⁶

As noted earlier, before a rule can become effective, it must be filed in accordance with CRA. We conduct an annual review to determine whether all final rules covered by the Act and published in the Federal Register have been filed with the Congress and us. We perform the review to both verify the accuracy of our database and to ascertain the degree of agency compliance with CRA. We forward a list of unfilled rules to OIRA for their handling, and, in the past, they have disseminated the list to the agencies, most of which file the rules or offer an explanation of why they do not believe a rule is covered by CRA.

Although we reported that agencies' compliance with CRA requirements was inconsistent during the first years after CRA's enactment, compliance improved over time. In general, we have found the degree of compliance to have remained fairly constant, with roughly 200 nonmajor rules per year not filed with our office. In the 10 years since CRA was enacted, all major rules have been filed in a timely fashion.

In the past 10 years, we also have issued eight opinions regarding what constitutes a "rule" under CRA in response to requests from congressional committees and members concerning various agency pronouncements and memorandums. CRA contains a broad definition of the term "rule," including more than the usual notice and comment rulemakings published in the Federal Register under APA. Under CRA, "rule" means the whole or part of an agency statement of general applicability and future effect designed to implement, interpret, or prescribe law or policy. For example, in 1996 we concluded that a memorandum issued by the Secretary of Agriculture in connection with the Emergency Salvage Timber Sale Program constituted a rule under CRA and should have been submitted to Congress and GAO before it could become effective.⁷ Similarly, in 2001, we concluded that a Fish and Wildlife Service Record of Decision entitled "Trinity River Mainstem Fishery Restoration" was a rule covered by CRA.⁸ We believe these opinions have strengthened the reach of CRA by insuring

⁶Number of major and nonmajor rules are as of March 21, 2006.

⁷See B-271505, Sept. 16, 1996.

⁸See B-287557, May 14, 2001.

compliance with the main thrust of the Act, which was to insure that agency actions, whether labeled a "rule" by the agency or not, are subject to congressional review. We have noted that certain congressional committees, such as the Joint Committee on Taxation, were taking an active role in overseeing agency compliance with CRA. As a result, for example, Internal Revenue Service procedures, rulings, regulations, notices, and announcements are forwarded as CRA submittals.

The one major area of noncompliance with the requirements of the Act has been that agencies have not always delayed the effective date of major rules for 60 days as required by the Act.⁹ Agencies have filed 610 major rules with our office, and, for 71 of those rules, the agencies did not delay the effective date for the required 60 days.

One reason for noncompliance with the 60-day delay is that the agencies have misapplied the "good cause" exception which waives the delay of the rule if it would be impracticable, unnecessary, or contrary to the public interest.¹⁰ Since the enactment of CRA, our office has consistently held that the "good cause" exception is only available if a notice of proposed rulemaking was not published and public comments were not received.¹¹ Many agencies, following a notice of proposed rulemaking and receipt of comments, have stated in the preamble to the final major rule that "good cause" existed for not providing the 60-day delay.

The other reason for noncompliance is that the statute that an agency is implementing by issuing the final major rule contains a date by which the Secretary or Administrator must issue the regulation, and the date, in many instances, does not permit the 60-day delay. However, the CRA states that it shall apply notwithstanding any other provision of law.¹²

⁹5 U.S.C. § 801(a)(3)(A).

¹⁰5 U.S.C. § 808(2).

¹¹Sec B-275519; B-275552, Dec. 9, 1996.

¹²5 U.S.C. § 806(a).

Trends in Presidential and Congressional Review of Rulemaking

Agencies and GAO have provided Congress a considerable amount of information about forthcoming rules in response to CRA. The limited number of CRA joint resolutions introduced might suggest that this information generates little additional oversight of rulemaking. However, as we found in our review of the information generated on federal mandates under UMRA, the benefits of compiling and making information available on potential federal actions should not be underestimated.¹⁰ Further, as we also found regarding UMRA, the availability of procedures for congressional disapproval may have some deterrent effect. The Congressional Research Service has reported that several rules have been affected by the presence of the review mechanism, suggesting that the CRA review scheme has had some influence.

Still, as I noted in my testimony before this Subcommittee last November, efforts to enhance presidential oversight of agencies' rulemaking appear to have been more significant and widely employed in recent years than similar efforts to enhance congressional oversight.¹¹ In particular, our reviews have noted the growing influence and authority of OIRA in the oversight of the regulatory process.¹² Some of this increased activity reflects administration initiatives, but it also includes some new responsibilities assigned by Congress through statute, such as the requirement for OMB to issue governmentwide guidance to implement the Information Quality Act.¹³

In contrast, there does not appear to have been a similar expansion of direct congressional influence and authority over the regulatory process, although bills have been introduced over the years to enhance the mechanisms available for congressional oversight of agencies' rulemaking. Some recent legislative proposals have focused on expanding the information and analysis available to Congress on pending rules, while

¹⁰See GAO, *Unfunded Mandates: Analysis of Reform Act Coverage*, GAO-04-637 (Washington, D.C.: May 12, 2004) and *Unfunded Mandates: Views Vary About Reform Act's Strengths, Weaknesses, and Options for Improvement*, GAO-05-434 (Washington, D.C.: Mar. 31, 2005).

¹¹See GAO, *Federal Rulemaking: Past Reviews and Emerging Trends Suggest Issues That Merit Congressional Attention*, GAO-06-228T (Washington, D.C.: Nov. 1, 2005).

¹²See GAO, *Rulemaking: OMB's Role in Reviews of Agencies' Draft Rules and the Transparency of Those Reviews*, GAO-03-029 (Washington, D.C.: Sept. 22, 2003).

¹³The Information Quality Act is also known as the Data Quality Act. Consolidated Appropriations Act, 2001, Pub. L. No. 106-554, 114 Stat. 2763, 2763A-153-54 (Dec. 21, 2000).

others focus on enhancing the mechanisms that Congress could employ for its own review—and potential disapproval—of agencies' rules.

As the major example of the first category of proposals, Congress passed the Truth in Regulating Act (TIRA) in 2000 to provide a mechanism for it to obtain more information about certain rules.¹⁷ In contrast to the essentially procedural reviews that GAO now conducts under CRA, TIRA contemplated a 3-year pilot project during which GAO would perform independent evaluations of "economically significant" agency rules when requested by a chairman or ranking member of a committee of jurisdiction of either House of Congress. However, during the 3-year period contemplated for the pilot project, Congress did not enact any specific appropriation to cover TIRA evaluations, as called for in the Act, and the authority for the 3-year pilot project expired on January 15, 2004. Therefore, we have no information on the potential effectiveness of this mechanism.

Congress has considered reauthorizing TIRA, and we have strongly urged that any reauthorization of TIRA continue to contain language requiring a specific annual appropriation for GAO before we are required to undertake independent evaluations of major rulemakings. Such an expansion of GAO's current lines of business without additional dedicated resources would pose a serious problem for us, especially in light of what will likely be increasing budgetary constraints in the years ahead. It would also likely serve to adversely affect our ability to provide the same level of service to the Congress in connection with our existing statutory authorities. We have also recommended that TIRA evaluations be conducted under a pilot project basis.

Members of Congress have also introduced several bills over the past year that would provide additional mechanisms for direct review and approval (or disapproval) of agencies' rules.¹⁸ Some of these proposals would modify how Congress reviews information submitted under CRA and how the disapproval procedures would work. These bills could, for example, create a joint committee that would be tasked with reviewing all rules to determine whether a disapproval resolution under CRA should be introduced. We have conducted no work that would provide information on the potential effectiveness of such changes.

¹⁷Pub. L. No. 106-312, 114 Stat. 1218 (Oct. 17, 2000), 5 U.S.C. § 801 note.

¹⁸See, for example, H.R. 576, H.R. 931, and H.R. 3148.

Mr. Chairman, this concludes my prepared statement. Once again, I appreciate the opportunity to testify on these important issues. I would be pleased to address any questions you or other Members of the Subcommittee might have at this time.

If additional information is needed regarding this testimony, please contact J. Christopher Mihm, Managing Director, Strategic Issues, at (202) 512-6806 or mihmj@gao.gov.

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Mr. CANNON. Thank you.
Mr. Rosenberg.

**TESTIMONY OF MORTON ROSENBERG, ESQ., SPECIALIST IN
AMERICAN PUBLIC LAW, AMERICAN LAW DIVISION OF THE
CONGRESSIONAL RESEARCH SERVICE, LIBRARY OF CON-
GRESS, WASHINGTON, D.C.**

Mr. ROSENBERG. Thank you very much, Mr. Chairman and Mr. Coble.

I'm pleased to be here again, dealing with an important issue involved in our administrative law project. I have submitted a report of the 10 years of action under the CRA and also my statement for the record. Let me just make certain points, as quickly as I'm able to. As you know, I'm verbose.

Point one is that when the House and Senate passed this legislation, they understood that they were addressing a fundamental institutional concern. That institutional concern involved the development of the administrative state, the fact that there is tremendous amount of delegation of rulemaking and law-making authority to the agencies, that those delegations are broad and vague, and that they're absolutely necessary.

Point two is that Congress, over the years, has been criticized as abdicating its responsibility with respect to oversight of those delegated authorities. The sponsors of the legislation said, and I quote, "In many cases, this criticism is well founded. Our constitutional scheme creates a delicate balance between the appropriate roles of Congress in enacting laws and the executive branch in implementing those laws. This legislation will help address the balance, reclaiming for Congress some of its policymaking authority without at the same time requiring Congress to become a super regulatory agency."

Well, the statistics that have been compiled by GAO and reflected in their testimony and in my report indicate that those hopes seem to have been dashed. That, indeed, the anticipation that the agencies, because of the existence of the CRA, become a factor in the rule development process—a key factor—and level the playing field and provide the kind of regulatory accountability to Congress and the responsibility of Congress for overseeing it, appear to have been dashed.

And indeed, events over the last decade have exacerbated very much the CRA, in addition to the flaws of the CRA. Some of the flaws—and the major ones, that I would pick out, the two major ones are the lack of a screening device for Congress to be able to identify particularly the rules that need to be looked at by Congress and the absence of an expedited procedure in the House for House consideration of a joint resolution of disapproval that is, you know, concurrent with and complementary to the Senate's procedure.

Again, as I said, compounding the problem of a flawed mechanism is the development of a strong presidential review process. That started with President Reagan's establishment of the Office of Information and Regulatory Affairs as the clearinghouse for all rules during the—in the first month of the Reagan administration.

Those executive orders were very, very effective, and Congress was well aware during the '80's and the—and the '90's of how effective those executive orders were in sensitizing the agencies to the President's agenda and diverting it from Congress' agenda and Congress' intent in delegating authority with respect to certain kinds of rulemakings.

Those executive orders and that concept of what has been called the new presidentialism have been continued—were continued during the Clinton administration and has continued today in the Bush administration. The administration of John Graham of OIRA has been even more effective than it was during the Reagan administration.

Congress passed the CRA with that in mind and with the understanding that even during the Reagan administration, there was strong congressional opposition to presidential controls that were being developed at that particular time.

More recently, what we have seen is what I would call a denigration by the Executive Branch of Congress' abilities and Congress' role in the law-making process and in the oversight process. In a very widely cited article, the current dean of the Harvard Law School posits the notions of the new presidentialism, and suggests that when Congress delegates administrative and law-making power specifically to a department or agency head, it is at the same time making a delegation of those authorities to the President himself, unless the legislative delegation specifically states otherwise.

From this, she asserts, flows the President's constitutional prerogative to supervise, direct, and control the discretionary actions of all agency officials. The author states that, and I quote, "A Republican Congress proved feckless in rebuffing Clinton's novel use of directive power, just as an earlier Democratic Congress, no less rhetorically inclined, had proved incapable of thwarting Reagan's use of a newly strengthened regulatory process."

And she goes on to explain that, "The reasons for this failure are rooted in the nature of Congress and the law-making process. The partisan and constituency interests of individual Members of Congress usually prevent them from acting collectively to preserve congressional power or, what is the same thing, to deny authority to other branches of the Government."

She then goes on to effectively deride the ability of Congress to restrain a President—a presidential intent on controlling the administration of the laws. She states, "Because Congress rarely is held accountable for agency decisions, its interest in overseeing much administrative action is uncertain. And because Congress' most potent tools of oversight require collective action and presidential agreement, its capacity to control agency discretion is restricted. But viewed from the simplest perspective, presidential control and legislative control of administration did not present an either/or choice. Presidential involvement instead superimposes an added level of political control onto the congressional oversight system. That, taken on its own and for the reasons just given, has notable holes."

Dean Kagan's observations were like a blueprint for what has been occurring during the Bush administration.

Let me conclude by saying that the CRA reflects a recognition of the need to enhance the political accountability of Congress and the perception of legitimacy and competence of the administrative rule-making process. It also rests on an understanding that broad delegations of rulemaking authority to agencies are necessary and appropriate and will continue for the indefinite future.

The Supreme Court's most recent decision, rejection of an attempted revival of the nondelegation doctrine, adds impetus for Congress to consider several facets and ambiguities of the current mechanism. Absent review, current trends of avoidance of notice and comment rulemaking, the lack of full reporting of covered rules under the CRA, limited judicial review, and what I've just pointed out, an increasing presidential control over the rulemaking process, is likely to continue.

As I said, there are two major things that I think should be done to help ameliorate this. One is a screening mechanism, and the second is expedited procedures. One might say that, you know, putting them in legislation would be subject to presidential veto. But I believe that you could accomplish this by the action of Congress alone without presidential veto, and that would be utilizing Congress' rulemaking authority.

A joint committee that has power to screen and recommend with respect to—to the jurisdictional committees and send to the jurisdictional committees in the House and the Senate recommendations for disapproval resolutions can be established by concurrent resolution.

An expedited procedure in the House needs only a resolution of the House to establish. And I think in determining whether—what the next step to do is it may be too politically difficult to pass a law, this might be a way to go.

Thank you.

[The prepared statement of Mr. Rosenberg follows:]

PREPARED STATEMENT OF MORTON ROSENBERG, ESQ.

Mr. Chairman and Members of the Subcommittee,

I am very pleased to be before you again, this time to discuss a statute, The Congressional Review Act (CRA), that I have closely monitored since its enactment ten years ago yesterday. Your commencement of oversight of this important piece of legislation is opportune and perhaps propitious.

As my CRS Report on the decade of experience under the CRA details, we know enough now to conclude that it has not worked well to achieve its original objectives: to set in place an effective mechanism to keep Congress informed about the rule-making activities of federal agencies and to allow for expeditious congressional review, and possible nullification of particular rules. The House and Senate sponsors of the legislation made clear the fundamental institutional concerns that they were addressing by the Act:

As the number and complexity of federal statutory programs has increased over the last fifty years, Congress has come to depend more and more upon Executive Branch agencies to fill out the details of the programs it enacts. As complex as some statutory schemes passed by Congress are, the implementing regulations are often more complex by several orders of magnitude. As more and more of Congress' legislative functions have been delegated to federal regulatory agencies, many have complained that Congress has effectively abdicated its constitutional role as the national legislature in allowing federal agencies so much latitude in implementing and interpreting congressional enactments.

In many cases, this criticism is well founded. Our constitutional scheme creates a delicate balance between the appropriate roles of the Congress in enacting laws, and the Executive Branch in implementing those laws. This legislation will help to redress the balance, reclaiming for Congress some of its policy-

making authority, without at the same time requiring Congress to become a super regulatory agency.

The numbers accumulated over the past ten years are telling. Almost 42,000 rules were reported to Congress over that period, including 610 major rules, and only one, the Labor Department's ergonomics standard, was disapproved in March 2001. Thirty-seven disapproval resolutions, directed at 28 rules, have been introduced during that period, and only three, including the ergonomics rule, passed the Senate. Many analysts believe the negation of the ergonomics rule was a singular event not likely to soon be repeated. Furthermore not nearly all the rules defined by the statute as covered are reported for review. That number is probably at least double those actually submitted for review. Federal appellate courts in that period have negated all or parts of 60 rules, a number, while significant in some respects, is comparatively small in relation to the number of rules issued in that period.

It was anticipated that the effective utilization of the new reporting and review mechanism would draw the attention of the rulemaking agencies and that its presence would become an important factor in the rule development process. Congress was well aware at the time of enactment of the effectiveness of President Reagan's executive orders centralizing review of agency rulemaking, from initial development to final promulgation, in the Office of Management and Budget's Office of Information and Regulatory Affairs (OIRA) in the face of aggressive challenges of congressional committees. The Clinton Administration, with a somewhat modified executive order, but with an aggressive posture of intervention into and direction of rule-making proceedings, continued a program of central control of administration.¹ The expectation was that Congress, through the CRA, would again become a major player influencing agency decisionmaking.

The ineffectiveness of the CRA review mechanism, however, soon became readily apparent to observers. The lack of a screening mechanism to identify rules that warranted review and an expedited consideration process in the House that complemented the Senate's procedures, and numerous interpretative uncertainties of key statutory provisions, may have deterred its use. By 2001, one commentator opined that if the perception of a rulemaking agency is that the possibility of congressional review is remote, "it will discount the likelihood of congressional intervention because of the uncertainty about where Congress might stand on that rule when it is promulgated years down the road," an attitude that is reinforced "so long as [the agency] believes that the president will support its rules."²

Compounding such a perception that Congress would not likely intervene in rule-making, particularly after 2001, has been the emergence of what has been called by one scholar as the "New Presidentialism,"³ that has become a profound influence in administrative and structural constitutional law. It is a combination of constitutional and pragmatic argumentation that holds that most of the government's regulatory enterprise represents the exercise of "executive power" which, under Article II, can legitimately take place only under the control and direction of the President; and the claim that the President is uniquely situated to bring to the expansive sprawl of regulatory programs the necessary qualities of "coordination, technocratic efficiency, managerial rationality, and democratic legitimacy" (because he alone is elected by the entire nation). One of the consequences of this presidentially centered theory of governance is that it diminishes the other important actors in our collaborative constitutional enterprise. Were it maintained that the Congress is constitutionally and structurally unfit for running democratic responsiveness, public-regardness, managerial efficiency and technocratic rationality, this scholar's suggested response is: why bother talking with Congress about what is the best way to improve the practice of regulatory government?

In a widely cited 2001 article,⁴ the current dean of the Harvard Law School, posits the foregoing notions and suggests that when Congress delegates administrative and lawmaking power specifically to department and agency heads, it is at the same time making a delegation of those authorities to the President, *unless the legislative delegation specifically states otherwise*. From this flows, she asserts, the President's constitutional prerogative to supervise, direct and control the discretionary actions

¹ See, Christopher Yoo, Steven G. Calabresi, and Anthony J. Colangelo, "The Unitary Executive in the Modern Era, 1945-2004," 90 Iowa L. Rev. 601, 690-729 (2005) (detailing the history of presidential control of administrative actions of departments and agencies in the Reagan, Bush I, Clinton and Bush II administrations) (Yoo).

² Mark Seidenfeld, "The Psychology of Accountability and Political Review of Agency Rules," 51 Duke L.J. 1059, 1090 (2001).

³ Cynthia R. Farina, "Undoing The New Deal Through The New Presidentialism," 22 Harv. J. of Law and Policy 227 (1998).

⁴ Elena Kagan, "Presidential Administration," 114 Harv. L. Rev. 2246 (2001) (Kagan).

of all agency officials. The author states that “a Republican Congress proved feckless in rebuffing Clinton’s novel use of directive power—just as an earlier Democratic Congress, no less rhetorically inclined, had proved incapable of thwarting Reagan’s use of a newly strengthened regulatory review process.”⁵ She explains that “[t]he reasons for this failure are rooted in the nature of Congress and the lawmaking process. The partisan and constituency interests of individual members of Congress usually prevent them from acting collectively to preserve congressional power—or, what is the same thing, to deny authority to other branches of government.”⁶ She goes on to effectively deride the ability of Congress to restrain a President intent on controlling the administration of the laws:

Presidential control of administration in no way precludes Congress from conducting independent oversight activity. With or without significant presidential role, Congress can hold the same hearings, engage in the same harassment, and threaten the same sanctions in order to influence administrative action. Congress, of course, always faces disincentives and constraints in its oversight capacity as this Article earlier has noted. Because Congress rarely is held accountable for agency decisions, its interest is in overseeing much administrative action is uncertain; and because Congress’s most potent tools of oversight require collective action (and presidential agreement), its capacity to control agency discretion is restricted. But viewed from the simplest perspective, presidential control and legislative control of administration do not present an either/or choice. Presidential involvement instead superimposes an added level of political control onto a congressional oversight system that, taken on its own and for the reasons just given, has notable holes.⁷

Dean Kagan’s observations and theories appear to have been almost a blueprint for the presidential actions and posture toward Congress of the current Administration.⁸

The CRA reflects a recognition of the need to enhance the political accountability of Congress and the perception of legitimacy and competence of the administrative rulemaking process. It also rests on the understanding that broad delegations of rulemaking authority to agencies are necessary and appropriate, and will continue for the indefinite future. The Supreme Court’s most recent rejection of an attempted revival of the nondelegation doctrine⁹ adds impetus for Congress to consider several facets and ambiguities of the current mechanism. Absent review, current trends of avoidance of notice and comment rulemaking, lack of full reporting of covered rules under the CRA, judicial review, and increasing presidential control over the rulemaking process will likely continue.

There have been a number of proposals for CRA reform introduced in the 109th Congress that address more effective utilization of the review mechanism, most importantly a screening mechanism and an expedited consideration procedure in the House of Representatives. Two such bills, H.R. 3148, introduced by Rep. Ginny Brown-Waite, and H.R. 576, filed by Rep. Robert Ney, both provide for the creation of joint committees to screen rules and for expedited House consideration procedures. H.R. 3148 also suggests a modification of the CRA provision that withdraws authority from an agency to promulgate future rules in the area in which a disapproval resolution has been passed with the enactment by Congress of a new authorization. That provision has been seen as a key impediment to the review process. Both proposals are expected to receive further consideration.

Mr. CANNON. You’re always provocative, and I really enjoyed that testimony. We’ll come back in just a few minutes. But those are very good points.

Mr. Gaziano, you’re recognized for 5 minutes.

TESTIMONY OF TODD F. GAZIANO, ESQ., SENIOR FELLOW IN LEGAL STUDIES, AND DIRECTOR, CENTER FOR LEGAL AND JUDICIAL STUDIES, THE HERITAGE FOUNDATION, WASHINGTON, D.C.

Mr. GAZIANO. Good afternoon, Mr. Chairman.

⁵ Kagan at 2314.

⁶ *Id.*

⁷ Kagan at 2347.

⁸ See Yoo at 722–30.

⁹ *Whitman v. American Trucking Assn’s*, 531 U.S. 457 (2001).

Thank you for inviting me to talk about the operation of a law that too often is neglected.

In my written testimony, I talk about some of the democratic and separation of powers theory that supports this legislation. But I'm going to try to confine my oral testimony to more practical concerns.

I want to first turn to an evaluation of the effectiveness of the CRA, and I want to talk about the three purposes of the CRA. And the first is, as Mr. Mihm has suggested, is to advance public record-keeping of agency rulemaking.

The CRA's legislative history makes clear that the broad definition of a rule was chosen for several reasons; one of them was to help Congress and its supporting agencies better catalogue the corpus of agency rules that affect the public.

I am somewhat disappointed that compliance has not been complete, and I actually think that the incidence of noncompliance may be higher than that which GAO has been able to record. Anecdotal evidence and investigation by other Committees of this House has suggested as much.

Nevertheless, the catalogue of nearly 42,000 rules and the public database that GAO has set up, together with the required reports, is no doubt a very valuable resource for Congress and for scholars of the regulatory process.

The second purpose of the Congressional Review Act is to change agency rulemaking behavior. Now it's true that the CRA has not been invoked as often as its sponsors and early commentators expected. But as opposed to the "glass is half empty" conclusion that Mort talked about, I think that it is not wise to conclude that it's necessary that it's had no impact on agency behavior and legislative accountability.

In fact, there is anecdotal evidence that when Congress invokes the CRA, particularly during the rulemaking process, it can have an effect. What that evidence suggests to me, Mr. Chairman, is that it can be a tool to increase Congress' leverage when Members choose to use it.

Now some point to the ergonomics rulemaking and say the only time that we can enact a law is when a rule is issued, unpopular rule is issued at the end of an Administration that isn't supported by the incoming Administration.

In my written testimony, I explain why I'm not sure that that is the case. But even if that is one limitation to the rule, that's an important use of the CRA: to put a stop to such midnight regulations.

But I do want to address one other limitation that I think has been exaggerated, and that is the assumption that Presidents will veto any resolution of disapproval for rules that come out of their Administrations. Certainly, it is the case that Presidents might consider such vetoes. But in my written testimony, I mention three reasons why a President might not veto such resolutions of disapproval.

But even if a President does veto such resolutions of disapproval, let me suggest two positive outcomes from the standpoint of democratic theory. The first is that the President would be more directly accountable for the regulation—both he and his Administration

would not be able to hide behind the “Congress made me do it. We had no discretion, but to issue this particular regulation” excuse.

The second benefit, even of a presidential veto, of course, that isn’t immediately overridden is that once Congress expresses its will in that way, it usually can get its—have its will enacted in some other way, by adding a rider to a different piece of legislation or through other means. Creative minds, of course, can certainly influence the enforcement of a particular rule and change its operation in the future.

The third major purpose of the Congressional Review Act is to enhance legislative accountability for agency rulemaking. And I submit to you that by its action or inaction, Congress is now more accountable for agency rules. I think that the CRA was designed by its sponsors and does make it harder for both the President and Congress to evade their particular share of responsibility.

To the extent that the CRA does have some limitations, I certainly believe Congress should make further reforms. But Congress is, ultimately, responsible.

In my remaining time, I just want to mention one interpretive issue and three possible reforms, just almost by name. The first interpretive issue is that the courts have somewhat disagreed on, and that’s the scope of the limitation on judicial review that’s contained in section 805.

The key question is this. May a court consider whether a rule that has never been submitted to a Congress is in effect? And I submit that the better interpretation of the statute is that the courts can properly pass on that issue.

But I’m requesting this Committee or suggesting to this Subcommittee, respectfully, that this issue merits special attention in the future. No matter what the courts decide about this issue, I suggest that this Subcommittee should ensure that there’s at least limited judicial review of that triggering mechanism in the future, even if it requires future legislative amendment.

The other matters that I would commend to this Subcommittee’s further consideration is I do think that there is a desperate need for an OIRA-like organization in Congress. I feel somewhat presumptuous—it would be somewhat presumptuous of me to suggest exactly what that is, but I also think that it makes no sense from a separation of powers standpoint for you to be so seriously outmanned in the regulatory review. So I think the Committees of jurisdiction also need to significantly increase their staff.

The two other, more dramatic proposals that I would suggest are that Congress consider requiring congressional approval of major rules. Not make them subject to disapproval, but actually require affirmative congressional approval.

And the final reform that I certainly think is justified is to prevent the proliferation of crimes from being defined in regulations. I think that if it is worthy to criminalize, Congress ought to define the contours of crimes.

Thank you, Mr. Chairman.

[The prepared statement of Mr. Gaziano follows:]

PREPARED STATEMENT OF TODD F. GAZIANO

TESTIMONY OF

TODD F. GAZIANO

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BEFORE THE UNITED STATES HOUSE OF REPRESENTATIVES

COMMITTEE ON THE JUDICIARY

SUBCOMMITTEE ON COMMERCIAL AND ADMINISTRATIVE LAW

REGARDING

“THE TENTH ANIVERSARY OF THE CONGRESSIONAL REVIEW ACT”

30 MARCH 2006

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Good afternoon, Mr. Chairman and other distinguished Members of the Subcommittee. Thank you for inviting me to testify today on the operation of a law that is too often neglected. For the record, I am a Senior Fellow in Legal Studies and Director of the Center for Legal and Judicial Studies at The Heritage Foundation, a nonpartisan public policy, research, and educational organization. I am a graduate of the University of Chicago Law School and a former law clerk to the U.S. Fifth Circuit Court of Appeals. During different periods in the Reagan, Bush, and Clinton Administrations, I served in the U.S. Department of Justice, Office of Legal Counsel, where I provided legal advice to the White House and four Attorneys General on a variety of matters, including administrative law issues related to the rulemaking process.

As the Subcommittee Members also may know, I was honored to serve as a Subcommittee Chief Counsel in this body in 1996 when the Congressional Review Act (CRA) was debated and enacted. The original House version of the CRA was introduced as an amendment to another bill by Rep. David M. McIntosh, then-chair of the Subcommittee on National Economic Growth, Natural Resources and Regulatory Affairs, which employed me. I also had the privilege of working closely with Senator Nickles, the original Senate sponsor, and his legislative staff, as well as with House Judiciary Committee Chairman Henry Hyde and his senior staff, on the final language of the bill before it was added as a subtitle to a larger bill that was signed into law ten years ago yesterday.

I mention my personal involvement as an agent of Congress not to relate long-irrelevant details regarding the legislative debate over the CRA—and certainly not to claim any more credit than that of one of several scribes—but simply as bearing on my detailed familiarity with its text, structure, and legislative history. To the extent that I discuss the legislative intent of the CRA and the expectations of its sponsors, I attempt to confine myself to the public record, including the joint legislative history introduced in the House and the Senate by all of the principal legislative sponsors.

Nevertheless, my personal experience probably has also caused me to think, write, and speak about the CRA more than I otherwise would as an administrative law scholar. It is therefore a special pleasure to share with you some of my thoughts about its successes, limitations, and promise as a part of our administrative law. My testimony begins with a brief statement regarding the democratic theory behind the Congressional Review Act. I then touch on the effectiveness of the CRA, discuss some interpretive issues and possible reforms to make it more powerful, and conclude with additional thoughts on how the CRA (and more extensive congressional review of agency rulemaking in general) could better approximate the separation of powers ideal.

Democratic Theory and the Separation of Powers

The Congressional Review Act requires executive agencies to submit covered rules to Congress before they may go into effect. The Act provides special procedures in both Houses that enable Congress to expeditiously consider special, unamendable resolutions of disapproval that would overrule the regulation. If passed by Congress, such resolutions of disapproval are then presented to the President for his signature or veto as is the case with any other bill.¹

Before turning to more practical issues, it is helpful to note that the Congressional Review Act was intended to increase democratic accountability for rulemaking and to reinvigorate, at least in a minor way, one aspect of the constitutional separation of powers that has been weakened over time. In

¹ For a more detailed discussion of the operation of the Act, see Morton Rosenberg, "Congressional Review of Agency Rulemaking: An Update and Assessment of the Congressional Review Act After Ten Years," CRS (March 27, 2006).

short, the Framers would have approved of a device like the CRA because it reinforces the constitutional scheme that they so carefully crafted.

The Framers' concern was tyranny, not just by a monarch, but by his many administrative officials as well. One of my favorite passages of the Declaration of Independence lists this as a justification for revolution: "He has erected a multitude of new Offices, and sent hither Swarms of Officers to harass our People, and eat out their Substance." Agency bureaucrats can be as dangerous and harassing today as they were in 1776—unless they are constrained in some meaningful way.

One of the most important devices adopted by the Framers to prevent tyrannical government was the separation of powers. The Framers were familiar with Montesque's admonition that there can be no liberty where the legislative and executive powers are united in the same official. This idea of separating government powers had begun to be implemented in the colonial governments and later in the state governments at the time of the framing of the United States Constitution.

The separation of powers is expressed in various ways in the Constitution, including the structure of the Constitution and several of its explicit provisions. Nevertheless, Madison acknowledged a common fear of the proposed government when he noted in *Federalist* 46 that, "The accumulation of all power, legislative, executive and judiciary in the same hands may justly be pronounced as the very definition of tyranny." (This formulation actually trumps Montesque's.) In several of the subsequent *Federalist Papers*, Madison explained that citizens need not fear that the new Constitution neglected the separation of powers. The Constitution, he argued, would keep the powers of government more effectively separated than the early state governments because it pitted ambition against ambition to keep the different branches of government perpetually in check.

The clearest expression of the separation of powers can be found in the vesting clauses, which are the first sentences of Articles I, II, and III. Article I begins thus: "All legislative Powers herein granted shall be vested in a Congress of the United States..." Article II begins in a similar fashion: "The executive Power shall be vested in a President..." And Article III begins with an analogous grant of power: "The judicial Power of the United States shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." Note there is no mention of independent agencies, or anything else "independent" for that matter.²

As this Subcommittee knows, the purpose of the separation of powers was not to protect government officials' power for sake of those officials, but to protect individual liberty. Power was understood to be corrupting, and the more power concentrated in one person or branch, the greater the threat to liberty. It was for this reason that the Framers struggled to divide the necessary powers of the government. But they also paid special attention to keeping them separate for the long run.

What legal scholars and historians refer to as the delegation (or nondelegation) doctrine is a necessary corollary to this separation of powers framework. As it applies to Congress, it is the simple notion that Congress may not delegate its core legislative power to the executive or judicial branches or to other entities. Congress must write the laws itself. It cannot delegate the law-writing power because that would upset the balance of powers and ultimately endanger our individual liberties.

² Executive branch agencies include many so-called "independent" agencies. Congress may designate an agency as "independent" for various statutory purposes, but all agencies that exercise significant discretion under the laws of the United States are in the executive branch for constitutional purposes. *Cf. Morrison v. Olson*, 487 U.S. 654 (1988).

When does Congress's delegation of rulemaking authority to executive branch agencies cross the line between filling in administrative gaps in the laws Congress has enacted and actually writing what are the equivalent of new laws? This is one of the more difficult questions of constitutional law. The Supreme Court once policed this line actively, but it has largely abdicated this responsibility since the late 1930s.³ Nevertheless, there are still some clear limits on delegated authority beyond which Congress cannot go.⁴ Although Congress's delegation of rulemaking power may be very broad, it cannot be completely standardless. Recent decisions of the Supreme Court have held that a law that authorizes rulemaking must contain an "intelligible principle" to guide agency action.

The most significant recent pronouncement by the Supreme Court was a disappointment to those who had hoped for a minor re-invigoration of the nondelegation doctrine. In *Whitman v. American Trucking Association*, the Court found an "intelligible principle" in the Clean Air Act that grants the EPA extremely broad discretion to regulate thousands of potential pollutants, even if those rules impose billions of dollars in costs and bankrupt entire industries.⁵ Some might reasonably wonder whether the discretion accorded to the EPA amounts to "the accumulation of [practically] all power, legislative, executive and judiciary in the same hands" that Madison equated with the "very definition of tyranny." No matter how well meaning it might be, the EPA decides what pollutants to regulate, how specifically to control those pollutants, and when and where its regulations apply. It then writes voluminous rules, enforces its own regulations, and adjudicates many actions subject to a very limited and deferential standard of judicial review.

Only Justice Thomas expressed serious concern with the delegation in *Whitman*, though he cast his opinion as a concurrence because the issue was not properly raised by the litigants. Thomas's opinion is wonderful, as usual. My paraphrase of his opinion is this: 'I agree the Clean Air Act has an intelligible principle, like other laws the Court has heretofore approved. But that is not the relevant test under the Constitution. The Constitution confers *all* legislative powers to Congress. The real question is whether the delegation is anything other than legislative.'⁶ According to a solid majority of justices still on the Court, however, Congress need only provide vague but intelligible principles to enable the executive to legislate as it sees fit. This is not the separation of powers ideal.

That the courts allow Congress to delegate sweeping regulatory power to executive agencies does not mean it *should* do so, especially when it exercises no further control over the matters delegated. With broad delegation now the norm, Congress ought to increase oversight and control over the agency rulemaking process. In other words, if the delegation doctrine is on life support, then Congress must devise other procedures to approach and reinforce the separation of powers ideal. The Congressional Review Act was a small step to restore constitutional government and the constitutional separation of powers. The joint statement of its principal sponsors expresses that intent:

As the number and complexity of federal statutory programs has (sic) increased over the last fifty years, Congress has come to depend more and more upon Executive Branch agencies to fill out the details of the programs it enacts. As complex as some statutory schemes passed by Congress are, the implementing regulation is often more complex by several orders of magnitude. As more and

³ Legal scholars continue to debate the appropriateness of this change, but almost all agree that the courts have significantly increased the deference they accord to congressional delegations of regulatory authority since the late 1930s.

⁴ For example, the Supreme Court still has not overruled its early New Deal cases of *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935), and *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935).

⁵ 531 U.S. 457, 472-76 (2001).

⁶ 531 U.S. at 486-87 (Thomas, J., concurring). Thomas ends his three-paragraph concurrence expressing a willingness to address that specific question in a future case.

more of Congress'[s] legislative functions have been delegated to federal regulatory agencies, many have complained that Congress has effectively abdicated its constitutional role as the national legislature in allowing federal agencies so much latitude in implementing and interpreting congressional enactments.

In many cases, this criticism is well founded. Our constitutional scheme creates a delicate balance between the appropriate roles of the Congress in enacting laws, and the Executive Branch in implementing those laws. This legislation will help to redress the balance, reclaiming for Congress some of its policymaking authority, without at the same time requiring Congress to become a super regulatory agency.

* * *

Because Congress often is unable to anticipate the numerous situations to which the laws it passes must apply, Executive Branch agencies sometimes develop regulatory schemes at odds with congressional expectations. Moreover, during the time lapse between passage of legislation and its implementation, the nature of the problem addressed, and its proper solution, can change. Rules can be surprisingly different from the expectations of Congress or the public. Congressional review gives the public the opportunity to call the attention of politically accountable, elected officials to concerns about new agency rules. If these concerns are sufficiently serious, Congress can stop the rule.⁷

Evaluating the Effectiveness of the CRA

1. Enhanced public recordkeeping of agency rulemaking.

Prior to the CRA, the public record of agency rulemaking was even spottier than it is today. Only certain regulations must be published in the *Federal Register*, and the *Federal Register* includes many proposals and other materials that are not final rules. The CRA's broad definition of a rule was chosen for several reasons, among them to help Congress and its supporting agencies to catalogue the corpus of agency rules that affect the public. As its text and legislative history make clear, the CRA was not designed to cover matters related to agency internal management or organization but was intended to cover any "agency statement of general applicability and future effect" that substantially affects the rights or obligations of those outside the agency. Notice-and-comment rules, interpretive rules, and guidance documents all fall within this standard.⁸

Although this broad definition should encompass almost every final agency statement that affects the public, investigations by GAO and the Government Reform and Oversight Committee have confirmed that agencies are not submitting all covered rules as the CRA requires, and instead, are principally submitting only those that are published in the *Federal Register*.⁹ It is also problematic that OMB has not satisfactorily complied with a separate mandate that it issue guidance to the agencies to improve compliance with the CRA.¹⁰ That could change if the regulated community prevails in one or more high profile challenges to, for example, an agency guidance document or handbook that was never sent to Congress.

I defer to the other witnesses to describe the number and nature of the rules that have been filed

⁷ 142 Cong. Rec. E571, E575. See also 142 Cong. Rec. 6922 and 142 Cong. Rec. S 3683 (containing the identical joint legislative history of the CRA).

⁸ See 5 U.S.C. §§ 551 and 804(3).

⁹ See Morton Rosenberg, CRS Report, *supra* note 1, at 24-27 and accompanying citations.

¹⁰ *Id.* at 27 and note 46.

with Congress pursuant to the CRA. Undoubtedly, though, the catalogue of approximately 41,800 major and non-major rules, together with required reports on agencies compliance with various statutory and presidential review requirements, is a valuable resource for Congress and scholars of the regulatory process.

2. Changing agency rulemaking behavior.

The CRA probably has not been invoked as often as its sponsors and early commentators had expected, but that does not mean that it has had no impact on agency behavior and legislative accountability. Anecdotal evidence suggests that Congress has influenced controversial rules by invoking the CRA. Even if the number of rules so influenced has not been large, this evidence demonstrates that the CRA gives Congress some additional leverage with agencies—when Members choose to use it. This may influence agencies’ work on controversial rules even when the CRA is not invoked and even though Congress has made little direct use of its power to overturn rules.

The Occupational Safety and Health Administration’s ergonomics rule is the only rule overturned by a resolution of disapproval that became law.¹¹ Some, including my distinguished co-panelist Morton Rosenberg, argue that the ergonomics rule is a *sui generis* example because it was promulgated at the end of one administration and was not supported by the incoming administration. There is much truth to this observation, but that is still an important use of the CRA. Putting a check on midnight regulations that might bankrupt entire industries and needlessly strain our economy is valuable. Regulations should not be rushed to publication in the face of expected opposition by the democratically elected President-elect. Among its other purposes, the CRA exists to undo such regulations that a lame-duck administration has attempted to finalize.

There are other advantages to using the CRA to overturn a controversial major rule rather than relying on the next administration to attempt a repeal of the rule. An agency repeal is costly and time-consuming, and depending on the statute that authorized the rule, the attempt might be subject to lengthy litigation. If successful, repeal may create inequities between citizens who were subject to agency enforcement actions before and after the repeal. Under the CRA, however, rules may be overturned relatively quickly, with little legal uncertainty. Moreover, rules disapproved pursuant to the CRA are treated as if they were never in effect, eliminating any inconsistencies in treatment.

Nevertheless, the effect of the CRA is lessened over time if it is used in only rare cases. The CRA would have a greater impact on agency behavior if Congress used it even a few times to invalidate rules during the middle of an administration. In geopolitical terms, just a few missiles in the hands of an emerging state can change the balance of power in an entire region. One OMB official described the CRA as a Minuteman Missile, deterring conduct by its mere existence. For this analogy to ring true, however, there would have to be a credible threat of that missile being launched.

One reason Congress may not have used the CRA as often as anticipated is that Congress has other tools at its disposal, such as legislative riders on appropriations bills, to accomplish the same end. With recent interest in reforming the appropriations process, these other tools may become disfavored.

One clear limitation of the CRA is that a president might be inclined to veto any resolution disapproving a rule that made it through his own regulatory review process. Yet, this limitation should not be exaggerated to the point that it becomes a self-fulfilling prophecy—or is never tested because

¹¹ See Public Law 107-5 (2001).

Congress offers no resolutions to veto. There are at least three reasons why a president might not veto a resolution of disapproval regarding a rule issued by his administration:

- (a) The rulemaking may be one mandated by Congress that the president is not particularly fond of. In short, a president may not like each rule some long-ago Congress set in motion just because it came to fruition in his administration.
- (b) The rule may be issued by one of the so-called “independent” agencies Congress has attempted to insulate from direct presidential control. In such case, the president may have had fewer opportunities to shape the rule’s final development. For this or similar reasons, the president might prefer to have the particular agency (which may soon have more of his own appointees in office) start over and draft a substantially different rule.
- (c) A president may simply be reluctant to veto any legislation and decide that a particular resolution of disapproval is not worth making an exception to his usual practice.

But even if a president did veto a resolution of disapproval for a rule issued by his administration and the Congress could not immediately override his veto, there are two positive outcomes from the standpoint of democratic theory. The first is that the president would be more directly accountable for the regulation. His administration could not hide behind the “Congress-made-me-do-it/we-had-no-discretion-but-to-issue-the-regulation” excuse.

The Framers intended that the president be personally responsible and accountable for his administration. To this end, the Framers rejected several proposals at the Constitutional Convention for a Council of Revision and for a constitutional Privy Council for fear that the president would hide behind their advice and that would diminish his accountability to the people.¹² The Framers even changed early drafts of the Opinion Clause of the Constitution to ensure that any advice to the president and any cabinet government was initiated and dispensed with at the president’s choosing.¹³ With the growth of the administrative state, Congress must restore of the lines of accountability so that modern presidents are not able to hide behind agency officials with supposed technical expertise.

The second beneficial result of a veto would be to set other democratic forces in motion. Congress often can find ways to enforce its will without directly overriding the president’s veto, such as by including a vetoed measure in a must-pass bill or employing other political means. CRS recently estimated that 95 percent of all recent earmarks were contained in report language or other non-binding legislative documents.¹⁴ The president could legally ignore all of these earmarks, especially if he seeks (as all modern presidents do) line-item veto authority. Nevertheless, modern presidents abide by almost all report-language earmarks for the simple reason that upsetting powerful members of Congress is costly. Creative minds can craft a variety of exceptions, interpretations, and other enforcement guidelines than can significantly alter the enforcement decisions of a particular agency.

3. Enhancing legislative accountability for agency rulemaking.

The CRA has enhanced legislative accountability for agency rulemaking even if it could be

¹² See Todd Gaziano, “Opinion Clause,” in *The Heritage Guide to the Constitution*, pp. 201-03 (Edwin Meese III, et al., eds., Regnery 2005).

¹³ *Id.* The Opinion Clause is Art. II, § 2, cl. 1.

¹⁴ See Robert Novak, “Bush cool to idea to cut spending,” *Chicago Sun-Times*, March 27, 2006.

shown that the CRA has not substantially changed agency behavior or improved the regulations that are issued. By its action or inaction, Congress is now more accountable for agency rules. This is analogous to the increased presidential accountability when Congress does pass a resolution of disapproval. The president is directly accountable, whether he signs or vetoes the resolution.

In short, the CRA makes it much more difficult for the president and for Congress to avoid their respective share of responsibility. Like the president, Members of Congress sometimes play the blame game to the detriment of responsible government. Public choice theory suggests that congressional authorizers have the most to gain if they can claim credit for doing something about a perceived public problem but shift the costs of decision-making to someone else. By passing a vague law, they may claim credit for the perceived good, and if the agency writes regulations that are unpopular, they can often shift the blame onto the “out-of-control” agency. That’s the best of both worlds for a politician but the worst of all worlds for the body politic.

The predictable, and sometimes truthful, response from an agency official who issues an unpopular regulation is “Congress made me do it.” As discussed, the president can hide behind this response as well, unless Congress takes positive steps to disapprove the regulation. As ever, success has a thousand fathers, but no one takes responsibility for a misguided or unpopular regulation. The CRA makes it harder for Congress to claim that an agency is “out of control” because Congress can more clearly control the rules agencies write now.

Some in Congress never liked the Congressional Review Act because it does help, in a minor way, to increase political accountability for agency rulemaking. After overturning the ergonomics regulation in 2001, many Members now appropriately see the CRA as a double-edged sword. The CRA’s congressional sponsors always understood this.

Agency claims that they have no discretion in the issuance of particular regulations present special concerns, and the CRA applies to them in a unique way. If such a claim is true, the CRA refocuses attention on who is responsible and gives Congress an easy opportunity to reconsider the underlying mandate. Too often, however, an agency’s claim of limited discretion is overstated. With enactment of the CRA, trying to shift blame to Congress became riskier. If Congress accepts the agency’s claim and disapproves the rule anyway, the agency’s future range of discretion is narrowed even more, and possibly eliminated, because the agency is forbidden from re-issuing a substantially similar rule without express congressional authorization.

Agencies’ attempts to avoid responsibility will not disappear, but they are now more difficult, as they should be in a functioning democracy. Likewise, Congress has made itself more accountable for agencies’ rules, whether it exercises its authority under the CRA or not. To the extent that the CRA has serious limitations, Congress should consider further reforms.

Even without changes to the statute, Congress can take several steps to make better use of the CRA. Members, especially committee chairs, should conduct oversight during the rulemaking process of particularly problematic rules and cite the potential for CRA disapproval when communicating with agency officials. Congress should not cross the line and attempt to micromanage proper executive functions under other chapters of the Administrative Procedure Act, but it ought to express itself forcefully if an agency proposes a rule that is strongly opposed by a majority in Congress. After the ergonomics rule disapproval, this threat carries some weight.

The earlier Congress engages in the rulemaking process, the more effective Congress’s

engagement will be. Although some tools Congress has used to investigate enforcement actions are inappropriate (such as depositions of career staff), broad oversight of the rulemaking process is justified because modern rulemaking is at least quasi-legislative to begin with. It is arguably Congress's power that is being exercised. Active congressional involvement is appropriate to rein in agency excess or simply a few bad regulations.

And if a statute really does require an agency to issue a particularly draconian rule, Congress still can use the expedited procedures of the CRA to change course or make a corrections. No one is immune from the law of unintended consequences. Congress should not pretend that it has perfect foresight either. In sum, Congress should use the CRA to correct its own mistakes as well as those of executive agencies.

Resolving Interpretive Issues

Morton Rosenberg's report for the Congressional Research Service on the CRA is helpful in discussing various issues of CRA statutory interpretation that remain unresolved.¹⁵ For the most part, I agree with his analysis and conclusions regarding the proper resolution of those issues, but I add a few thoughts here as well.

(a) Courts should not consult legislative history unless the text of the statute is inherently ambiguous, and courts should give some types of legislative history evidence more weight than others. Nevertheless, there are several reasons why the courts should accord the Joint Explanatory Statement of the House and Senate Sponsors of the CRA greater weight than is normally granted to post-enactment legislative material.

First, the Joint Explanatory Statement is the only document written by the sponsors and relevant committee chairmen responsible for the legislation. It does not conflict with other committee reports because there are none. Second, it is found in the Congressional Record in the House on the day of passage. See 142 Cong. Rec. 6922-6930 (March 28, 1996). My own memory is unreliable and I have not found a unanimous consent request that would have permitted such a placement, but without contrary evidence, the courts should accord a presumption of regularity to the proceedings of the coordinate branches. Thus, there is every reason to conclude that at least the House collectively wanted the Joint Explanatory Statement to be treated as a contemporaneous legislative history. Third, even if deemed "post-enactment" legislative history, it is only a few weeks post-enactment. Some of the reasons to be distrustful of such material remain, but the Statement was not written in the midst of litigation or an ongoing battle with the executive branch. The Statement is not a mere "litigation position." Finally, it has many of the hallmarks of a joint conference report, explaining the nature of the compromises between earlier House and Senate versions and containing a brief legislative history, a summary of major provisions, definitions, etc. It was not written with a narrow purpose to affect one provision or change the legislative debate. Indeed, its general purpose, to substitute for a conference report on the CRA, is set forth at the beginning of the Statement's coverage of the Act.

(b) The most important unresolved issue may be the scope of the limitation on judicial review in section 805. The key question is this: may a court recognize that a rule has no legal effect due to the undisputed fact that it was not delivered to Congress as required by the CRA? The text of the limitations provision is somewhat ambiguous, and the text of other sections of the CRA further compounds the ambiguity. For example, section 801(g) contains a separate prohibition on courts

¹⁵ Morton Rosenberg, CRS Report, *supra* note 1, at pp.23-39.

inferring any intent from Congress's failure to enact a resolution of disapproval. If the limitation on judicial review in section 805 were absolute, there would have been no reason for Congress to include section 801(g).

Where possible, statutes must be read not to render one of their provisions irrelevant. I agree with Morton Rosenberg that the Department of Justice's interpretation and two early court decisions on section 805 are not persuasive and that court decisions on analogous statutes are on point. The legislative history explains how to resolve the apparent ambiguity. The courts may consider pure issues of law relating to whether certain rules or laws are in effect—e.g., what legal effect to give enacted resolutions of disapproval and whether regulations are or are not in effect as a matter of law. Subsidiary determinations of fact or matters involving internal congressional procedure, such as a major rule determination by the Office of Information and Regulatory Affairs or each House's determinations regarding its calendar and the applicability of the expedited review provisions, are not subject to judicial review.

This issue merits special attention by this Subcommittee in the future. To the extent that the courts are not consistent in interpreting the limitation on judicial review in this way and read it as a complete bar on any judicial review of the effectiveness of a rule that was never submitted to Congress, the Judiciary Committee should consider legislation to clarify the matter and affirm the judgment of the court in *United States v. Southern Indiana Gas and Electric Co.*¹⁶ Mort Rosenberg's analysis is persuasive that the absence of any judicial review on the triggering mechanism of the CRA would permit the complete frustration of its purpose. The legislative history shows that the original sponsors did not expect that result. Whether the limitation on judicial review currently is ambiguous or not, this Subcommittee should ensure that limited judicial review is available in the future.

Potential Improvements in Congressional Review Procedures

Proposals for improved screening mechanisms to pinpoint rules that need congressional review also are worthy of serious consideration. As a separation of powers matter, it makes no sense for Congress to be so seriously outmanned compared to the executive branch when it comes to the review of regulations issued by the ever-expanding administrative state—especially when rulemaking is at least a quasi-legislative endeavor. (In my view, some regulations are purely legislative and beyond the constitutional power of Congress to delegate, but a majority of the Supreme Court is not currently persuaded of this view. See *infra*.)

Congress does not need as many people to review final rules as the executive branch employs formulating them. In my view, Congress needs the equivalent of an Office of Information and Regulatory Affairs and it needs to increase the regulatory staff of its substantive authorizing committees. Evaluating a cost-benefit analysis does not take the same manpower as performing it originally, but evaluation does require a similar expertise and management direction. At the committee level, it does not even require the same level of technical expertise as that relied upon by an agency to identify the outside witnesses and experts who can help the committee examine a particular rulemaking record and agency determinations. An additional number of smart and dedicated generalists who can aid the committee to find the right experts is all that is essential.

H.R. 1704 in the 105th Congress and H.R. 3356 in the 108th Congress would create different congressional institutions to focus attention on rules that need congressional review, and both are

¹⁶ 55 ERC (BNA) 1597 (D. S.D. Ind. 2002).

respectful of existing lines of committee jurisdiction. H.R. 3356 has the additional advantage of meshing well with the CRA by amending its review provisions. It seems presumptuous of me to comment further on what is best for your internal organization. Moreover, the perfect often is the enemy of the good in such reform debates. But Congress should do something, both to create more effective centralized management of congressional review responsibilities and to increase the total number of committee staff devoted to the review of agency regulations.

Reinvigorating The Separation of Powers Ideal

1. Congressional approval of agency rules.

H.R. 931 in the 109th Congress and similar bills introduced by different Members over the past ten years would go much further than focusing Congress's attention on particular rules for possible disapproval. They would require that certain covered rules must be statutorily ratified or approved before they could go into effect. To avoid constitutional problems, such a reform statute would have to amend existing and future grants of regulatory authority so that the affected agencies could not issue certain types of final rules. Instead, agency authority for certain matters would be to conduct hearings, formulate, and propose final rules to Congress.

One disadvantage with the language of H.R. 931 is that it would not amend the CRA but would supersede it. Proposals from prior Congresses would use the major rule definition in the CRA and amend the Act to require that major rules receive congressional approval. A practical argument for such a change is that major rules often have a bigger impact on the American economy than many of the laws Congress enacts. This Subcommittee conducted hearings on at least one such proposal in the year after the Congressional Review Act was enacted. These extremely valuable proposals have already received commentary in the administrative law literature, not the least of which by two of us on this panel.¹⁷ With a further expression of interest by the Subcommittee, I would be happy to elaborate on the virtues of such proposals in reinvigorating the separation of powers ideal.

2. Preventing abuses of the criminal law.

The House and Senate Judiciary Committees should also act to curb the disturbing trend of agencies (aided in large part by other authorizing committees) creating a host of new regulatory offenses punishable by criminal sanctions. The operation of the criminal law is the government's most awesome and fearful tool from the standpoint of individual liberty. Traditionally, crimes were limited to offenses that were known to be inherently wrongful and done with a malicious intent (e.g., intentional killing, theft, battery). It makes sense to punish these traditional and knowingly culpable acts with special sanctions, but special protections of liberty were developed as well.

Some of those protections are still present in the courts, but Montesque's old fear did not extend to the trial process. Montesque's admonition was that there can be no liberty where the legislative and executive powers are united. That warning haunts us today as criminal offenses are increasingly being written and enforced by the same administrative agencies. At least in this one area, Congress should reserve to itself the power to write criminal laws and thereby separate the drafting and enforcement of the criminal code.

¹⁷ See Todd Gaziano, "Can the Separation of Powers Endure the Age of Muddled Thinking?," *Regulation*, vol. 20, no. 1 (1997); Morton Rosenberg, "Whatever Happened to Congressional Review of Agency Rulemaking?: A Brief Overview, Assessment, and Proposal for Reform," 51 *Admin. L. Rev.* 1051 (Fall 1999).

The U.S. Constitution mentions only three federal crimes, and yet it has been estimated that there are now some 4,000 federal crimes and that this is an increase of roughly 1,000 federal crimes in the last decade alone.¹⁸ Many of these offenses do not fit within the traditional categories of criminal law, and unfortunately, many of them do not concern inherently wrongful conduct (what the law refers to as *malum in se*) but violations of norms that are only wrongful because Congress has declared them to be so (what the law would label *malum prohibitum*). As bad as the proliferation of federal statutory crimes is—particularly the newer crimes that are not inherently wrongful—the proliferation of regulations punishable by criminal sanctions is even more troubling.

Typically, Congress passes a statute that makes the violation of some future agency regulation a crime. Such laws may even include criminal penalties for violations of permitting schemes, with the terms of every permit being different. Often the only intent requirement is that the defendant knew that he was taking certain actions and not that the actions violated the permit or the regulation. The civil liberties concerns associated with these schemes make those raised in the homeland security context pale in comparison.

The Congressional Research Service seemingly is unable to estimate how many federal regulations now carry criminal penalties.¹⁹ The American public has no chance of mapping the contours of regulatory criminal law, a basic prerequisite to following the law and avoiding criminal punishment.

Congress should enact a prohibition against crimes being defined in agency regulations. If it is serious enough to criminalize, Congress should define the offense. In the alternative, agencies should only be allowed to propose such crimes, which Congress could then enact with resolutions of approval.

Conclusion

Those who would declare the Congressional Review Act moribund mistake dormancy for a lack of any potential vitality. Reconstruction era statutes enacted to protect the civil rights of newly freed slaves lay largely dormant for about 100 years before private litigants rediscovered them. They have been used extensively ever since to vindicate fundamental civil rights for all Americans. The Alien Tort Claims Statute (really just one brief section of a larger act) was passed by an early Congress in the eighteenth century and has been rediscovered by private litigants almost 200 years later and validated by the Supreme Court. The CRA's impact in its first ten years has not been dramatic, but that does not dictate its future course.

Both Congress and private litigants have an opportunity to make better use of the CRA in the next decade (the latter if the effectiveness of a rule that was not submitted to Congress is subject to judicial review). Congress has both an institutional interest to re-assert its legislative primacy and an obligation to the American people to safeguard our liberties. The constitutional separation of powers requires no less vigilance.

¹⁸ John S. Baker, Jr., "Measuring the Explosive Growth of Federal Criminal Legislation," The Federalist Society for Law and Public Policy Studies, available at www.fcd-soc.org.

¹⁹ See Paul S. Rosenzweig, "The Over-criminalization of Social and Economic Conduct," Heritage Foundation Legal Memorandum No. 7, at 2 and note 3 (2003). Our understanding is based in part on conversations we have had with congressional staff, who have supposedly requested the information, and in part on informal conversations we have had with senior CRS officials. We would be happy to be proven wrong about CRS's ability to reliably estimate the number of crimes defined in regulations, e.g., if they provided a reliable number.

Mr. CANNON. Thank you.

Mr. Sullivan, you're recognized for 5 minutes.

**TESTIMONY OF JOHN V. SULLIVAN, ESQ., PARLIAMENTARIAN,
OFFICE OF THE PARLIAMENTARIAN, U.S. HOUSE OF REP-
RESENTATIVES, WASHINGTON, D.C.**

Mr. SULLIVAN. Thank you, Mr. Chairman.

May it please the Committee, thank you for the welcome and for the kind words about the Office of the Parliamentarian, most especially for the gracious acknowledgment of Lefty Sullivan, who I'm told in his Major League career lost but one game.

My predecessor, Charlie Johnson, was with you in 1997, and he assured me that this was a very pleasant experience. So I'm pleased to be here.

I am glad for the opportunity to help illuminate maybe one part of the factual predicate on which the Committee might decide whether to adjust the CRA or whether it's currently optimized to meet its desired ends.

As I indicate graphically in my written testimony, the CRA has engendered a tripling of the executive communications traffic to the Speaker. This flow of paper poses a significant increment of workload in the institution of the House. But, of course, this paperwork, mass though it may be, does serve a purpose.

When I read the testimony of my learned colleagues about a desirable deterrent effect of the act, it rings true to me. But I'm also reminded of the last 10 or 15 years of the Cold War, when we saw the key to our own nuclear deterrent shift dramatically away from megatonnage and in favor of accuracy.

I think that the Committee may want to assess whether a lesser volume of communications traffic might better optimize the oversight of the regulatory Committees of the rulemaking process, dwelling greater attention on a more selective universe of rulemaking actions.

I note that the act already differentiates among rulemaking actions on the basis of certain hallmarks of salience, and it might be time to consider whether additional discriminators might be sensible to constrict the flow and dwell stronger focus on the remaining stream.

Certainly, the Office of the Parliamentarian would be pleased to work with the Committee and with the staff on trying to identify ways to avoid any duplication of effort or any undue weight of paper.

I won't reiterate the rest of the written testimony, brief though it may be. I'm pleased to be here and happy to engage any questions you might have.

[The prepared statement of Mr. Sullivan follows:]

PREPARED STATEMENT OF THE HONORABLE JOHN V. SULLIVAN

Committee on the Judiciary)	Hon. John V. Sullivan
Subcommittee on Commercial)	Parliamentarian
and Administrative Law)	U.S. House of Representatives
U.S. House of Representatives)	
)	
)	
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)	Testimony
March 30, 2006)	Congressional Review Act

Mr. Chairman; members of the committee: I appreciate the opportunity to participate in your review of this important matter.

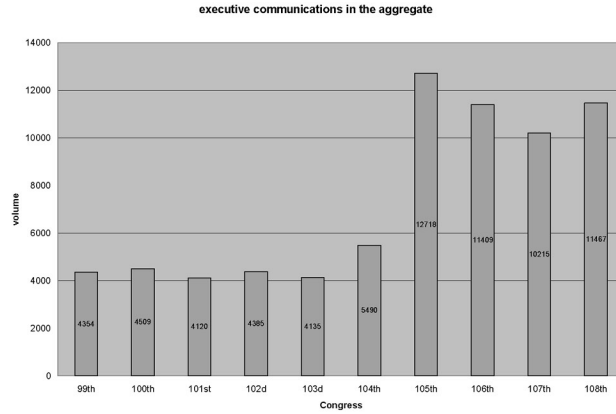
Several laws within the jurisdiction of the Committee on the Judiciary ensure that the exercise of quasi-legislative authority by the executive branch is subject to rigorous scrutiny. Some have long ensured that the public can follow and react to rulemaking actions as they develop. For 10 years now, chapter 8 of title 5, United States Code — colloquially known as the Congressional Review Act (CRA) — has separately focused on Congressional review of executive regulations. I am pleased to help illuminate one part of the factual predicate on which the Committee might judge whether the CRA is optimized to achieve its desired ends.

In the 103d Congress — the last full Congress before the enactment of the CRA — the executive departments transmitted 4,135 communications to the Speaker that warranted referral to committee.¹ In the 108th Congress — the most recent full Congress under the CRA — that number rose to 11,467.² The following pair of graphs depict the effects of the CRA on executive communications traffic.

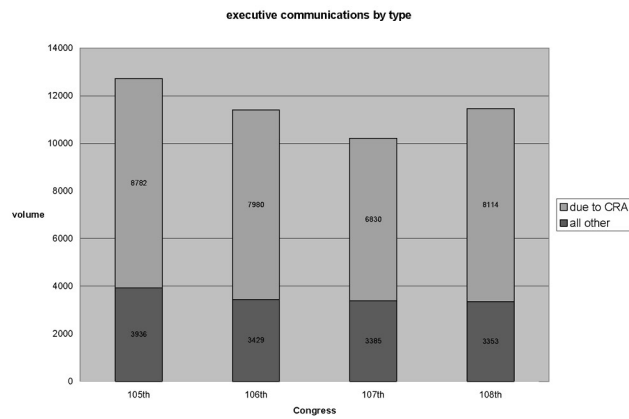
¹ See *Calendars of the United States House of Representatives and History of Legislation*, Final Edition, 108th Congress, 2003-2004, at p. 19-71.

² *Id.* at p. 19-76.

The first graph shows that executive communications have roughly tripled.



The second graph shows that, in each of the past three Congresses, the number of CRA communications has, indeed, been more than twice the number of other executive communications.



These communications transmit regulations promulgated by executive agencies for Congressional review. Under rule XII, they are received by the Speaker. Under rule XIV, the Speaker refers them to the committees having jurisdiction over their subject matters. The Speaker delegates to the Parliamentarian the task of identifying committees of referral — typically the committees having jurisdiction over the enabling statutes for the particular rulemaking actions.

This flow of paper poses a significant increment of workload. Although it is relatively easy to identify the appropriate committees of referral for the vast majority of these communications, the sheer volume of them affects not only the parliamentarians who must assess their subject matter but also the clerks who must move the paper and account for dates of transmittal. Some of the processing of this paper has been streamlined. Unlike other executive communications, multiple rules submitted by a single agency pursuant to the CRA may be bundled under a single cover letter.

Of course, this mass of paperwork has a purpose. The fundamental fulcrum of the CRA is that rulemaking agencies must submit proposed regulations to each House of Congress and to the Comptroller General and wait a statutory interval³ before major rules may be given effect. During this interval, Congress may deliberate on whether a proposed regulation might merit legislative disapproval.

In the first decade under the CRA, 21 joint resolutions of disapproval were introduced in the House and 16 were introduced in the Senate. None of the House joint resolutions passed the House. Three of the Senate joint resolutions passed the Senate. One of those also passed the House. Thus, the disapproval mechanism established by the Act has yielded one Congressional disapproval.⁴

³ Because of the need to track this interval, the date of receipt of a rule submitted pursuant to the CRA is published in the Congressional Record. With most other executive communications, only the date of referral to committee is published.

⁴ Public Law 107-5.

The Committee may want to assess whether a lesser volume of executive communications traffic might better optimize Congressional oversight of a more selective universe of rulemaking actions. The Act already differentiates among various rules on the basis of their salience. Some additional discrimination might be sensible. The Office of the Parliamentarian will be pleased to continue to consult with the Committee and its staff on initiatives to eliminate duplication of effort and reduce paperwork like those proposed in H.R. 5380 of the 106th Congress.⁵

Mr. Chairman, I am grateful for your attention and will be pleased to try to answer any questions you might have.

⁵ H.R. 5380 of the 106th Congress was introduced by Mr. Hyde (for himself, Mr. Conyers, Mr. Gekas, and Mr. Nadler) and referred to the Committee on the Judiciary. It proposed that the CRA be amended to no longer require separate submission to Congress of rules that are published in the Federal Register and to require the Comptroller General to submit weekly reports to each House of rules published in the Federal Register to the end that they be noted in the Congressional Record with a statement of referral to committee.

Mr. CANNON. Thank you, Mr. Sullivan.

If I might, Mr. Sullivan, I have just a couple of questions. Then we have a series of questions that we'll probably send you all that you can use to help us understand a little more about what we're doing here.

But if I might, Mr. Sullivan, you talked about Committees of jurisdiction, meaning I suppose authorizing Committees. And so, when you're talking about this amazing—and I just looked at your chart—this tripling of communications. And of course, we're organized by Committees now and have some more and less vague Committee jurisdictions. We have Government Reform, for instance, which would have some role here.

But if you—so when talking about the rules of jurisdiction and whether or not it makes sense, I think Mr. Rosenberg was talking about a Committee or Committees, would it make sense to have a Committee that is fairly heavily staffed deal with these issues of CRA? And that way, you don't put limiters or, I forget the term you used for it, but some way to describe the importance of this, but rather you have a Committee that is in place that reviews all of it, and we go through a—maybe a Committee process?

So instead of all the Committees of jurisdiction who would have a person assigned, does it make sense to have a Committee, for instance, obviously, I think this Committee, which oversees these activities generally, would have staff to review and deal with the paperwork and then focus, as is appropriate, politically on what some of these regulations are and, therefore, make the determination of importance based upon a single Committee overseeing the complex process?

Do you have any thoughts on that?

Mr. SULLIVAN. That sounds worthy of your consideration, Mr. Chairman.

As I understand it right now, until such time as the Speaker refers the communication to the Committee of jurisdiction over the enabling statute for the rulemaking, the only filtering that occurs really is by the words of the statute. The discriminators that exist under the status quo are just textually recited in the statute.

And as I understand Mr. Rosenberg's idea, it would be to achieve a higher level of granularity in that filtering process by having live experts applying their notions of discrimination, their own discriminatory sense to rulemakings as they come in.

And that certainly is one way to refine the flow to the regulatory Committees so that when they do hit the Committee of jurisdiction over the Clean Water Act, the counsel who specialize in that area will be able to bring the full force of their more concentrated expertise on it.

Any kind of filtering process I think is worthy of consideration. And as I said, right now, the filter is just the text of the statute, it might be worth considering putting an organ there.

Mr. CANNON. What I'm wondering is—I've spent a lot of my life doing administrative procedure, rulemaking stuff. I worked in the Reagan administration on coal mining and really created a third-tier of coal mine reclamation regulations. It was an amazing process early in my career.

But I'm wondering if—two things, Mr. Sullivan. First of all, what would the rules have to—how would they have to be changed for the House to do what I'm about to suggest? And then how would it actually, as a practical matter, work?

As I understand, you have communications now coming to the Speaker from the Administration, and those have increased significantly. Would it not be fairly simple, and I'm wondering about the effectiveness of the process to take those communications from the Speaker and then send them to a Committee, and that Committee would tend to look at all regulations? And to the degree that you needed the expertise of an authorizing Committee, there could be some sort of joint procedure.

Now that has to be done in a way that there is actually an appropriate use of discretion. But at some point, you have to say this is not worth something, and somebody has to—a Chairman has to say, "This is not worth it, this is worth it," and then follow up on that.

It would seem to me that that Committee would also require a lot of expertise over time, and we have a rule currently that term limits chairmen. So I'm giving you sort of an amorphous question.

But just wondering, given the rules today, could we take a pathway where you take all of these communications. They go through a well staffed process, but a political process that then works its will with the majority and minority and also works with other Committees, authorizing Committees that have the specific or special area expertise and possibly also with the appropriating Committees.

What changes would you see that would have to be made to do that? And does it make sense to even pursue that idea?

MR. SULLIVAN. I think that that sort of thing could be pursued without touching the statute, although it would be in the jurisdiction of the Committee on Rules. The House could ordain a 21st standing Committee and confer on it, call it the Committee on Filtering Rulemakings.

MR. CANNON. Let me just say that it would seem to me that making a 21st Committee, maybe it would justify it. But what you would have in that Committee, it would not—let me just ask you this.

If you took a sitting Committee, either Government Reform would be possibly appropriate or Judiciary, where I think it actually is appropriate, and expanded one of the Subcommittees, and maybe you got rid of term limits or something like that. So you could have somebody who actually liked doing it, would do it over a longer period of time and add some continuity. It would seem to me that that makes some sense as opposed to creating a new Committee. So I realize we're now dealing with some pretty big things here.

MR. SULLIVAN. Conceptually, it's exactly the same thing. The House could just add a new element to the subject matter jurisdiction of the Judiciary Committee or of the Government Reform Committee that said "review of executive rulemaking actions" and tell that Committee to have one of its Subcommittees or a new Subcommittee become expert at filtering and at ushering recommendations to the Committees of regulatory jurisdiction.

Mr. CANNON. And would the House need a rule change—part of that rule change would be and so communications to the Speaker would then be delegated to that Committee?

Mr. SULLIVAN. If Rule X said that that was the Committee that had jurisdiction over executive tenders of rulemaking actions under the CRA, then the Speaker would refer them to that new jurisdiction instead of his current practice of referring them to the sundry Committees who have enacted the enabling statutes for these rule-making powers.

Mr. CANNON. Do you have a recommendation in mind? Your job—I don't mean to put you in an uncomfortable position, but your job is to figure out how the rules work, and we're now suggesting a new context rule.

Would you put jurisdiction in all of the authorizing Committees to review regulations, or would you see it better working through either a new Committee or as a new Subcommittee of one of the existing Committees?

Mr. SULLIVAN. I think that's too substantive a question for a proceduralist like me.

Mr. CANNON. But procedurally, we don't have a problem doing that if we decide to do something like that?

Mr. SULLIVAN. No. And the basic philosophy of the Committee system is to develop and apply expertise in compartments, and maybe this is a compartment in which the House would like to develop and apply expertise on a special basis.

Mr. CANNON. And what we have now is just untenable, as your charts show. We have this massive communication with no—we haven't changed how we operate in the context of this massive communication, and then we get back to what Mr. Rosenberg called our dashed hopes or the dashed hopes of people who wanted to see a little more of this happening. So there is some high inconsistency here.

Let me just say, anybody else want to comment on how we should do this? That is, a new Committee or using existing Committees and having a new Subcommittee or as opposed to using the current—the authorizing Committees?

Sorry, Morton?

Mr. ROSENBERG. I could comment on that, just to be provocative.

What we have here is a congressional process. You know, in order to do what the framers of this legislation wanted to do, they had two houses involved. And what they—what wasn't thought through or didn't realize the problems at the time is that in order to—there are so many authorizing Committees, jurisdictional Committees out there, as you're pointing out, what might be a solution is not simply a special Committee, but a joint Committee, which has only the authority to recommend with respect to who will screen, has staff enough to make some analyses of rules that come over, pick out the particular ones that appear to be appropriate for congressional review.

There would be House Members and Senate Members. And the recommendations would be sent to the jurisdictional Committees of each House with a recommendation, if it's such, that they exercise their authority and issue a—you know, file a resolution of disapproval.

It has a lot of benefits, it seems to me, because, one, it provides the screening mechanism necessary, it provides some necessary expertise, and it also may take care of the political problem of taking away jurisdiction from current jurisdictional Committees.

What happens is those Committees have recommendations, and those recommendations are up to the jurisdictional Committees to go to the expedited procedures, you know, to formulate that.

I think that while your Committee would be a good one with regard to looking at this, it would probably be very difficult to get everybody to agree, even a House resolution, you know, of vesting you with all that authority. It's a problem that we see with the House Homeland Security Committee.

Mr. CANNON. I'm hoping most people think this is boring and not worthy of their attention. [Laughter.]

Mr. ROSENBERG. Just one idea. I'm for a separate Committee, and I'm much more for a joint Committee that helps both houses do the job.

Mr. CANNON. Thank you.

Mr. GAZIANO. In my written testimony, I said that I'm reluctant to say too much about this because the perfect sometimes is the enemy of the good in reform. And I think that the imperative is that you do something, that you create some sort of structure and increase staff to help with this.

But I—but I do think I know why, and here I may be stepping out of my—you know, into my personal memory versus the public record—why the parliamentarian was given the task of making referrals because: that was who everyone could agree with. That's the parliamentarian's traditional job.

I think there was an understanding that it would significantly increase their office workload. But let me suggest a couple of possibilities. One certainly is that Congress recognize that the parliamentarian's office at least needs sufficient increased manpower and staff or an adjunct or whatever to help with those referrals.

There is a concern by the authorizers that any other Committee but their Committee wouldn't have the expertise to know when the rulemaking is a good or bad rulemaking. So I think that you want to avoid the perfect being the enemy of the good.

Another possibility is to create more expertise somewhere else in Congress, whether it then advises the parliamentarian's office or the individual Committees. But I think part of what the permanent structure of that Committee would be is expertise in cost-benefit analysis and some cost-cutting expertise about the rulemaking process.

So there would be some permanent staff like the OIRA staff. And beyond that, you know, I think that there are these other issues and concerns that might come up. I would love for this Committee or any Committee to retain the jurisdiction, but I would fear that your "below the radar screen" approach might not go unnoticed as the legislation moved forward.

Mr. CANNON. And here I thought you were a person of great historical perspective. Given the attention these matters have had, I'm fairly sure the radar screen is not so sensitive.

I'd like to apologize for Mr. Watt, who—we had late votes and then an emergency meeting, and so he was not able to get down here and join us.

And I have just one other question sort of following up on this question and going back, I think, really to Mr. Mihm and Mr. Rosenberg talking about dashed hopes or talking about the number of reviews and these sorts of things.

What if you changed the premise of CRA away from a disapproval and to a requirement that Congress affirmatively act. Now that changes the nature of this discussion about what Committee it would go through. What it would mean, as a practical matter, is that we pass a lot of legislation all at a time, but it would—it would meet many of the criticisms we've had of the CRA.

Assume for a moment, it's politically possible. Does that make sense? And I think that most of you all would have some comment on that.

Do you want to start? Go ahead, Mort. Sure.

Mr. ROSENBERG. Seven years ago I suggested that in an article in the Administrative Law Review, That the most effective way of controlling administrative regulations is through a process whereby there has to be affirmative approval of regulations.

This creates some problems. If you have all rules that are subject to it, you have an enormous volume of rules that are going to come across. But I think that problem could be solved, and I addressed that in the article that I wrote in 1999. I believe that a screening committee that would deal with this could use a deeming process and take care of about 99.9 percent of the rules.

That is, deeming that rules that are sent over passed on a particular day, a CRA Wednesday that takes place each month, and you wouldn't have more than a 30- or a 60-day delay for 99.9 percent of the rules. And those that are pinpointed as needing more review would then go through a more rigorous approval process.

I think it could be created. I think it's constitutional. And assuming it's politically possible, I think that is the most viable way to go and the most effective way from Congress' institutional point of view.

Mr. CANNON. Would you get us a copy of the article you referred to for the record

Mr. ROSENBERG. Certainly.

Mr. CANNON. I'd appreciate that.
Chris?

Mr. MIHM. Mr. Chairman, we haven't looked at this issue directly, but I'd offer just two kind of broad observations on this.

One is that in response to your earlier question and some of Mr. Sullivan's charts, we talked about the enormous increase in workload and burden on the Congress that was required to review these things after the fact. It probably, that would be augmented several fold perhaps if Congress wanted to review them before implementation, that is, to pass on them.

Again, it's Congress' judgment as to whether or not it wants to go down that road. But I would just observe that it would probably entail quite a bit of additional work on behalf of the Congress, even taking, I think, context, some point that you could just focus on the major rules which would be the 610 or so.

The second thing that I would just observe, and this gets back to the broader agenda of this Subcommittee and in particular the hearing that you held last November, is that the Congress may want to spend more time looking more at the back end of the regulatory process.

That is, you know, one of the things that's really flown below the radar screen is after regulations are put in place, we almost never go back and say, "Gee, did we get what was promised as a result of this?" You know, we were promised either savings or better health or increased, you know, safety or whatever the case may be.

And in many cases, that probably plays out, but I'm willing to bet in some cases it does not. And we never go back and look at that. And so, a kind of a more retrospective analysis or focus on retrospective analysis we think would be very beneficial.

Mr. CANNON. Does that mean like a 3-year sunset? So suppose for a moment you had a joint Committee or each house had a Committee, and we had an expedited process. So something worked here. Would it make sense then to add a sunset to regulations so they came up automatically for political/congressional review?

Mr. MIHM. I'm not sure that I can go so far—I mean, we haven't done the work to justify whether or not there would be sunset. But certainly, it would be beneficial to require at least a periodic re-examination and perhaps in a report to the Congress. And that's something that we could be helpful in, in GAO, and we've tried to be in the past. To look at this, are we actually getting from a particular rule that was promised when we promulgated it, especially some of these major rules?

Mr. GAZIANO. Mr. Chairman, 10 years ago almost, last month, the House was set to vote on H.R. 994, the Sunset and Review Act, which, by the way, is maybe something you want to look at again, which would have sunsetted regulations in the congressional—in the CFR by part. So that's one option.

As far as the major rule, I think that what Mort has suggested is one approach. I think that this Subcommittee held a hearing about 9 years ago where the alternative to require major rules to receive affirmative authorization was discussed. I know that the sponsors of the CRA 10 years ago anticipated that, and that's why they created in the statute that distinction between major and nonmajor rules.

That did not exist in the statute at the time. It was only a function of executive order, and they codified that distinction so that some future Congress could make that. That would be roughly 61 rules a year divided between all the relevant authorizing Committees.

And it was understood by those who hoped that that would some day be considered by Congress that, of course, it wouldn't—it doesn't take as much legislative record to decide whether a rule should be enacted into law or not. That's already received the agency's attention. So it would not—let's say if a given Committee had five or so a year, it would not take the same level of attention as passing five other pieces of legislation.

But the democratic theory was major rules have bigger impact on the American economy than most laws Congress passes, at least if

it's in a major rule. Maybe you could define it in some other way. But at least if it's a major rule, Congress ought to enact it into law.

Mr. ROSENBERG. There's a problem here that can be overcome perhaps. Right now, under the CRA, a major rule is defined as major by OIRA, the OIRA Administrator. Who is going to do this differentiating between major and nonmajor rules? Congress can't do it on a piecemeal basis. That would probably be Chadha and be a problem.

That's why I struggled with that in writing the article about how you could do this. I've often thought of a tiered kind of structure where, but who would designate what it is? Could you write a definition that would cover all the rules that you want to come over?

There are some rules that nobody's going to think of as major until they explode upon you or they're looked at. So that's a problem that has to be addressed from a constitutional point of view, as well as a pragmatic point.

Mr. CANNON. Which is why you focus on a joint Committee. Personally, I'm not sure that works as well as two Committees that would have responsibility.

Mr. ROSENBERG. Well, you don't have a joint Committee if you have—

Mr. CANNON. But you have a single—

Mr. ROSENBERG. Joint Resolution of approval, then you don't need a joint Committee. But you still have—

Mr. CANNON. You have the underlying problem?

Mr. ROSENBERG. Yes.

Mr. CANNON. Which means you don't—it doesn't work through all the—the authorizing Committees because there's no way to have coherence.

Mr. ROSENBERG. But there can be a process whereby there can be a screening of all rules that come over as proposed rules. Then there can be a deeming process which gets rid of most of them and puts them into law after 30 or 60 days.

Mr. GAZIANO. I don't know that some people would like the effect of 42,000 laws, and courts having to interpret them. But there are—but Mort is right about the problem. There are two other possible solutions. Right now, there is no—Congress, in its wisdom for various reasons of expediency, decided not to make the OIRA determination subject to judicial review.

The two alternatives, if you were going to enact this, I think, very important reform, would be to make the OIRA determination subject to judicial review. So there is some risk, and that does avoid the *Chadha* problem. And that's why all regulations still have to come to Congress so that circumvention can be dealt with.

So that—and then you still need, I think, these other Committees because major rules are the minimum that Congress should be enacting into law. But then you make the nonmajor ones subject to—still subject to disapproval, but more effectively.

Mr. CANNON. Let me ask, John, suppose you had a single Committee of jurisdiction without the subject matter expertise. Is it possible to have a rule that allows or requires the joint Committee or the single Committee to work with other Committees? You know, we do that currently with the concurrent jurisdiction in Committees on some matters.

Is there a way to do that with a Committee that handles all of them and then somehow coordinates with Committees of expertise?

Mr. SULLIVAN. Yes, Mr. Chairman.

For example, you could contemplate that this panel would report not to the House, but to its sister Committees. It would make recommendations to the Committees that enacted the enabling statutes in the first instance.

Mr. CANNON. So serial jurisdiction?

Mr. SULLIVAN. Yes, sir.

Mr. CANNON. Interesting. All right.

Can I ask one other question? This is sort of technical, but if we had reports submitted electronically, is it possible to speed up this process, from your perspective as the parliamentarian, so that you take and delegate electronically some of this material? Would that speed up the referral process out of your office?

Mr. SULLIVAN. It might speed up the referral process. It certainly would make more efficient the movement of the paper and the tracking of submittal dates and so forth, the things that the clerk's office has to do with the flow.

The parliamentarian would still have to examine the substance of the rulemakings to discern the Committee jurisdictions in them, but I think it would materially assist the Legislative Resource Center and the others who have to move this paper.

Mr. CANNON. So do we need to do something to establish a requirement by the Administration to in some consistent manner submit these things electronically?

Mr. SULLIVAN. I assume that that might require that you visit the statutory text. I'm personally leery about going virtual on anything. Committees frequently want to teleconference instead of meet together face to face, or poll their Members instead of having them in the same room and voting, we constantly try to impress on them notion of Jeffersonian collegiality and the importance of Members being together in the flesh. So crossing the threshold of a virtual submission I would want to be very cautious about that.

But in terms of batch processing, if the comptroller bundled communications and had a covering electronic submission that could manage the submittal dates and the tracking and that sort of thing, I think that would be very helpful.

Mr. CANNON. Great. Thank you.

Obviously, this is a panel of experts who've been here before, and you all have given very thoughtful, insightful testimony on this issue. We appreciate your involvement in the broader APA review.

And with that, we will stand adjourned.

[Whereupon, at 3:43 p.m., the Subcommittee was adjourned.]

A P P E N D I X

MATERIAL SUBMITTED FOR THE HEARING RECORD



May 12, 2006

The Honorable Christopher B. Cannon
Chairman
The Honorable Melvin L. Watt
Ranking Minority Member
Subcommittee on Commercial and Administrative Law
Committee on the Judiciary
House of Representatives

On April 25, 2006, you requested that we respond to questions for the official record regarding your subcommittee's March 30, 2006, hearing on the Congressional Review Act. Our responses are included in this correspondence.

Responses to Questions from Chairman Cannon

1. Your testimony mentions that GAO has issued eight opinions regarding what constitutes a rule under the Congressional Review Act (CRA). Could you expand on how the GAO has defined what a rule is under the CRA, and what may be left out under that definition?

The CRA definition of what constitutes a rule is based on the meaning, with some exclusions, given the term in 5 U.S.C. 551(4) which defines rules subject to the Administrative Procedure Act (APA). As noted in our opinions, a rule is the whole or part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy.

The CRA's enumerated exclusions from being a covered rule are found at 5 U.S.C. 804(3):

"(A) any rule of particular applicability, including a rule that approves or prescribes for the future rates, wages, prices, services or allowances therefore, corporate or financial structures, reorganizations, mergers or acquisitions thereof, or accounting practices or disclosure bearing on any of the foregoing;

(B) any rule relating to agency management or personnel; or

(C) any rule of agency organization, procedure, or practice that does not substantially affect the rights or obligations of non-agency parties."

The APA exception is much broader, including "interpretive rules, general statements of policy, or rules of agency organization, procedure or practice."¹

According to the legislative history, the CRA deliberately narrowed the exclusions to capture those agency actions which attempted to circumvent notice and comment requirements and affected the rights or obligations of nonagency parties.

Most of our opinions in this area have involved an agency's claim that an agency statement or action is not a rule because it falls under the exclusion concerning agency procedure or practice. The agency argues that the statement only instructs agency personnel what to consider in a certain decision-making process. However, when we looked at the impact of the rules, it was clear that they had a substantial effect on the rights or obligations of nonagency parties. Such a finding was reached regarding the Tongass National Forest Land and Resource Management Plan, the Farm Credit Administration's National Charter Initiative, and the Trinity River Record of Decision.²

2. When you receive information required under the CRA from the agencies on a rule, are the agencies across the administration consistent in the information they provide? Is there consistency within the agencies?

Approximately 90 percent of the rules we receive from the agencies are submitted with the CRA Rule Submission Form developed by GAO and found on the GAO Web site. The agencies that use their own forms still supply our office with the information needed to comply with the CRA and enable GAO to enter the rule in our database.

Consistency within an agency has not been a problem because most of the executive agencies and independent regulatory agencies that submit the majority of the rules have designated a central control person who oversees the submission of the rules to our office and Congress to assure compliance with the CRA. This practice has also allowed our office to have a single contact person if we have further questions or need additional information concerning a submission.

3. Is there additional information, not currently required by the CRA, that GAO would find beneficial for the assessments of the reported rules?

Our office finds that the information required by the CRA and submitted by the agencies with the rule is sufficient for our assessment of the rule's compliance with the various regulatory statutes' and executive orders' requirements.

¹ 5 U.S.C. 558(b)(3)(A).

² See B-275178, July 3, 1997; B-296338, Oct. 17, 2000; B-287557, May 14, 2001.

Please contact me at (202) 512-6806 or mihmi@gao.gov if you, other subcommittee members, or your staffs have additional questions or if we can provide additional help to your work on these issues.

A handwritten signature in black ink, appearing to read "J. Christopher Mihm". The signature is fluid and cursive, with the first name "J." and last name "Mihm" being more distinct than the middle name "Christopher".

J. Christopher Mihm
Managing Director
Strategic Issues

CRS Report for Congress

Congressional Review of Agency Rulemaking: An Update and Assessment of the Congressional Review Act After Ten Years

Updated March 29, 2006

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**Congressional
Research
Service**

**Prepared for Members and
Committees of Congress**



Congressional Review of Agency Rulemaking: An Update and Assessment of the Congressional Review Act After Ten Years

Summary

On March 29, 1996, the President signed into law the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), P.L. 104-121, 110 Stat. 857-874, Subtitle E of which for the first time established a mechanism by which Congress can review and disapprove, by means of an expedited legislative process, virtually all federal agency rules. In its current form, however, some have questioned the efficacy of the review scheme as a vehicle to control agency rulemaking through the exercise of legislative oversight. These questions have been raised despite the use of the CRA to nullify OSHA's controversial ergonomics standards in March 2001. In the view of some observers, the OSHA action was the result of a unique confluence of circumstances not likely to soon recur: the White House and both Houses of Congress in the hands of the same political party, a contentious rule promulgated in the waning days of an outgoing administration; longstanding opposition to the rule by some in Congress and by a broad coalition of business interests; and encouragement of repeal by the President. On the other hand, some maintain that a number of major rules have been affected by the Agency recognition of the existence of the review mechanism, and argue that the review scheme has had a significant influence.

Among potential impediments to the law's use, the scheme provides no expedited consideration procedure in the House of Representatives; there is no screening mechanism to identify rules that may require special congressional attention; and a disapproval resolution of a significant or politically sensitive rule is likely to need a supermajority to be successful if control of the White House and the Congress are in different political hands, as was the case between April 1996 and January 2001. Moreover, a number of critical interpretive issues remain to be resolved, including the scope of the provisions' coverage of rules; whether an agency failure to report a covered rule is subject to court review and sanction; whether a joint resolution of disapproval may be utilized to veto parts of a rule or only may be directed at the rule in its entirety; and what is the scope of the limitation that precludes an agency from promulgating a "substantially similar" rule after disapproval of a rule. Some might argue that these potential impediments and uncertainties have contributed to the fact that of a total of 37 joint resolutions of disapproval that have been introduced to date since April 1996, only one has succeeded in passing and that one may have been *sui generis* because of the unique circumstances accompanying its passage. During that period 41,218 major and non-major rules have been reported and become effective.

This report will provide a brief explanation of how the structure of review scheme describes the criticisms of some observers concerning the way it has been utilized.

This report will be updated as warranted.

Contents

Introduction	1
Review of Agency Rules	2
Utilization of the Review Mechanism Since 1996	6
Discussion	16
1. Lack of a Screening Mechanism to Pinpoint Rules That Need Congressional Review; Proposals for Change	16
2. Lack of an Expedited House Procedure	20
3. The Deterrent Effect of the Ultimate Need for a Supermajority to Veto a Rule	20
4. The Reluctance to Disapprove an Omnibus Rule Where Only One Part of the Rule Raises Objection	21
5. The Uncertainty of Which Rules Are Covered By the CRA	24
6. The Uncertainty of the Effect of An Agency's Failure to Report a Covered Rule to Congress	27
7. The Uncertainty of the Breadth of the Prohibition Against An Agency's Promulgation of a "Substantially Similar" Rule After the Original Rule Has Been Vetoed	33
Conclusion	39
Selected Source Readings	40

List of Tables

Resolutions of Disapproval Introduced Under the Congressional Review Act (April 1996 - March 2006)	7
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Congressional Review of Agency Rulemaking: An Update and Assessment of the Congressional Review Act After Ten Years

Introduction

On March 29, 1996, the President signed into law the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), P.L. 104-121, 110 Stat. 857-874, Subtitle E of which for the first time established a mechanism by which Congress can review and disapprove, by means of an expedited legislative process, virtually all federal agency rules. In its current form, however, some have questioned the efficacy of the review scheme as a vehicle to control agency rulemaking through the exercise of legislative oversight. These questions have been raised despite the use of the CRA to nullify OSHA's controversial ergonomics standard in March 2001. It has been argued that the action on the OSHA proposal was the result of a unique confluence of circumstances not likely to soon recur: the White House and both Houses of Congress in the hands of the same political party, a contentious rule promulgated in the waning days of an outgoing administration; longstanding opposition to the rule by some in Congress and by a broad coalition of business interests; and encouragement of repeal by the President. On the other hand, some maintain that a number of major rules have been affected by Agency recognition of the availability of the review mechanism, and argue that the review scheme has had a significant influence.

Those who maintain that the CRA has not been appropriately utilized assert that the current procedure provides no expedited consideration procedure in the House of Representatives; lack of screening mechanism to identify rules that may require special congressional attention; and, that a disapproval resolution of a significant or politically sensitive rule is likely to need a supermajority to be successful if control of the White House and the Congress are in different political hands. They further maintain that a number of critical interpretive issues and questions remain to be resolved, including the scope of the provisions' coverage of rules; whether an agency failure to report a covered rule is subject to court review and sanction; whether a joint resolution of disapproval may be utilized to veto parts of a rule or only may be directed at the rule in its entirety; and what is the scope of the limitation that precludes an agency from promulgating a "substantially similar" rule after disapproval of a rule. From these critics' perspective potential impediments and uncertainties have contributed to the fact that of a total of 37 joint resolutions of disapproval that have been introduced to date since April 1996, only one has passed. They point out that during that period over 41,828 major and non-major rules have been reported and become effective.

This report will provide a brief explanation of how the review scheme was expected to operate and describe how it has been utilized. The possible reasons for the relatively limited use of the formal review mechanism thus far are assessed and congressional possible proposals are discussed.

Obviously, there are those who do not support increased utilization of the CRA review process. Those holding this opinion may represent a number of views including concern that expanded use of the process will lead to the disproportionate influence on Federal regulations by powerful interest groups or that many regulations have become too technical to be judged by “non-experts”. However, since those holding these or similar views have been notably silent during recent discussions of CRA issues, this report does not attempt to predict or describe these positions.

Review of Agency Rules

The congressional review mechanism, codified at 5 U.S.C. 801-808, and popularly known as the Congressional Review Act (CRA), requires that all agencies promulgating a covered rule must submit a report to each House of Congress and to the Comptroller General (CG) that contains a copy of the rule, a concise general statement describing the rule (including whether it is deemed to be a major rule), and the proposed effective date of the rule. A covered rule cannot take effect if the report is not submitted. Section 801(a)(1)(A). Each House must send a copy of the report to the chairman and ranking minority member of each jurisdictional committee. Section 801(a)(1)(C). In addition, the promulgating agency must submit to the CG (1) a complete copy of any cost-benefit analysis; (2) a description of the agency's actions pursuant to the requirements of the Regulatory Flexibility Act and the Unfunded Mandates Reform Act of 1995; and (3) any other relevant information required under any other act or executive order. Such information must also be made “available” to each House. Section 801(a)(1)(B).

Section 804(3) adopts the definition of “rule” found at 5 U.S.C. 551(4) which provides that the term rule “means the whole or part of an agency statement of general . . . applicability and future effect designed to implement, interpret, or prescribe law or policy.”¹ The legislative history of Section 551(4) indicates that the term is to be broadly construed: “The definition of rule is not limited to substantive rules, but embraces interpretive, organizational and procedural rules as well.”² The courts have recognized the breadth of the term, indicating that it encompasses “virtually every statement an agency may make,”³ including interpretive and substantive rules, guidelines, formal and informal statements, policy

¹ Section 804(3) excludes from the definition “(A) any rule of particular applicability, including a rule that approves or prescribes for the future rates, wages, prices, services, or allowance therefore, corporate or financial structures, reorganizations, mergers, or acquisitions thereof, or accounting practices or disclosures bearing on any of the foregoing; (B) any rule relating to agency management or personnel; or (C) any rule of agency organization, or practice that does not substantially affect the rights or obligations on non-agency parties.”

² Attorney General's Manual on the Administrative Procedure Act 13 (1948).

³ *Avoyelles Sportsmen's League, Inc., v. Marsh*, 715 F.2d 897 (5th Cir. 1983).

CRS-3

proclamations, employee manuals and memoranda of understanding, among other types of actions. Thus a broad range of agency action is potentially subject to congressional review.

The Comptroller General and the Administrator of the Office of Information and Regulatory Affairs (OIRA) of the Office of Management and Budget have particular responsibilities with respect to a “major rule,” defined as a rule that will likely have an annual effect on the economy of \$100 million or more, increase costs or prices for consumers, industries or state and local governments, or have significant adverse effects on the economy. The determination of whether a rule is major is assigned exclusively to the Administrator of OIRA. Section 804(2). If a rule is deemed major by the OIRA Administrator, the CG must prepare a report for each jurisdictional committee within 15 calendar days of the submission of the agency report required by Section 801(a)(1) or its publication in the Federal Register, whichever is later. The statute requires that the CG’s report “shall include an assessment of the agency’s compliance with the procedural steps required by Section 801(a)(1)(B).”⁴ Section 801(a)(2)(A). The CG has interpreted his duty under this provision relatively narrowly as requiring that he determine whether the prescribed action has been taken, i.e., whether a required cost-benefit analysis has been provided, and whether the required actions under the Regulatory Flexibility Act, the Unfunded Mandates Reform Act of 1995, and any other relevant requirements under any other legislation or executive orders were taken, not to examine the substantive adequacy of the actions.

The designation of a rule as major also affects its effective date. A major rule may become effective on the latest of the following scenarios: (1) 60 calendar days after Congress receives the report submitted pursuant to Section 801(a)(1)⁵ or after the rule is published in the Federal Register; (2) if Congress passes a joint resolution of disapproval and the President vetoes it, the earlier of when one House votes and fails to override the veto, or 30 calendar days after Congress receives the veto

⁴ See, e.g., *Chem Service, Inc. v. EPA*, 12 F.3d 1256 (3d Cir. 1993)(memorandum of understanding); *Caudill v. Blue Cross and Blue Shield of North Carolina*, 999 F.2d 74 (4th Cir. 1993)(interpretative rules); *National Treasury Employees Union v. Reagan*, 685 F.Supp 1346 (E.D. La 1988)(federal personnel manual letter issued by OPM); *New York City Employment Retirement Board v. SEC*, 45 F.3d 7 (2d Cir. 1995)(affirming lower court’s ruling that SEC “no action” letter was a rule within section 551(4)).

⁵ The General Counsel of the Government Accountability Office (GAO) has ruled that the 60-day period does not begin to run until *both* Houses of Congress receive the required report. See B-289880, April 5, 2002, opinion letter to Hon. Edward M. Kennedy, Chairman, Senate Committee on Health, Education, Labor and Pensions from Anthony H. Gamboa, General Counsel. The situation involved a Department of Health and Human Service’s (HHS) major rule published in the Federal Register on January 18, 2002 with an announced effective date of March 29, 2002. The House of Representatives, however, did not receive the rule until February 14, 2002. HHS thereafter delayed the effective date of the rule until April 15, 2002, in an attempt to comply with the CRA. But the Senate did not receive the rule until March 15, 2002. The General Counsel determined that the rule could not become effective until May 14, 2002, 60 days following the Senate’s receipt, relying on the language of Section 801(a)(1)(A) of the act requiring that a copy of a covered rule must be submitted “to each House of Congress” in order to become effective.

CRS-4

message; or (3) the date the rule would otherwise have taken effect (unless a joint resolution is enacted). Section 801(a)(3).

Thus the earliest a major rule can become effective is 60 calendar days after the later of the submission of the report required by Section 801(a)(1) or its publication in the Federal Register, unless some other provision of the law provides an exception for an earlier date. Three possibilities exist. Under Section 808(2) an agency may determine that a rule should become effective notwithstanding Section 801(a)(3) where it finds “good cause that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.”⁶ Second, the President may determine that a rule should take effect earlier because of an imminent threat to health or safety or other emergency; to insure the enforcement of the criminal laws; for national security purposes; or to implement an international trade agreement. Section 801(c). Finally, a third route is available under Section 801(a)(5) which provides that “the effective date of a rule shall not be delayed by operation of this chapter beyond the date on which either House of Congress votes to reject a joint resolution of disapproval under Section 802.”⁷

All other rules take effect “as otherwise allowed by law” after having been submitted to Congress under Section 801(a)(1). Section 801(a)(4). Under the Administrative Procedure Act, a final rule may go into effect 30 days after it is published in the Federal Register in final form. 5 U.S.C. 553(d). An agency, in its discretion, may delay the effectiveness of a rule for a longer period; or it may put it into effect immediately if good cause is shown.

All covered rules are subject to disapproval even if they have gone into effect. Congress has preserved for itself a review period of at least 60 days. Moreover, if a rule is reported within 60 session days of adjournment of the Senate or 60 legislative days of adjournment of the House, the period during which Congress may consider and pass a joint resolution of disapproval is extended to the next succeeding session of the Congress. Section 801(d)(1). Such held over rules are treated as if they were published on the 15th session day of the Senate and the 15th legislative day of the

⁶ Reviewing courts have generally applied the Administrative Procedure Act’s good cause exemption, from which this language is obviously taken, narrowly in order to prevent agencies from using it as an escape clause from notice and comment requirements. See, e.g., *Action on Smoking and Health v. CAS*, 713 F.2d 795, 800 (D.C. Cir. 1987). However, since Section 805 precludes judicial review for any “determination, finding, action or omission under this chapter”, there could be no court condemnation of a good cause determination. But the rule would still be subject to congressional vacation and retroactive nullification.

⁷ In *Leisegang v. Sect’y of Veterans Affairs*, 312 F.3d 1368, 1373-1376 (Fed. Cir. 2002), the appeals court held that Section 801(a)(3) “does not change the date on which [a major rule] becomes effective. It only affects the date when the rule becomes operative. In other words, the CRA merely provides a 60-day waiting period before the agency may enforce the major rule so that Congress has the opportunity to review the regulation.” At issue in the case was the date from which certain veterans benefits would be calculated. The benefit statute provided that it would be the date of the issuance of the rule. The government argued that the CRA was a superceding statute and that the effective date was when the CRA allowed it to be operative. The appeals court agreed with the veterans that the date of issuance, as prescribed by the law, was determinative.

CRS-5

House in the succeeding session and as though a report under Section 801(a)(1) was submitted on that date. Section 801(d)(2)(A), (e)(2). But a held over rule takes effect as otherwise provided. 801(d)(3). The opportunity for Congress to consider and disapprove is simply extended so that it has a full 60 session or legislative days to act in any session.

If a joint resolution of disapproval is enacted into law, the rule is deemed not to have had any effect at any time. Section 801(f). If a rule that is subject to any statutory, regulatory or judicial deadline for its promulgation is not allowed to take effect, or is terminated by the passage of a joint resolution, any deadline is extended for one year after the date of enactment of the joint resolution. Section 803. A rule that does not take effect, or is not continued because of passage of a disapproval resolution, may not be reissued in substantially the same form. Indeed, before any reissued or new rule that is “substantially the same” as a disapproved rule can be issued it must be specifically authorized by a law enacted subsequent to the disapproval of the original rule. Section 801(b)(2).

Section 802(a) spells out the process for an up or down vote on a joint resolution of disapproval.⁸ A joint resolution of disapproval must be introduced within 60 calendar days (excluding days either House of Congress is adjourned for more than three days during a session of Congress) after the agency reports the rule to the Congress in compliance with Section 801(a)(1). Timely introduction of a disapproval resolution allows each House 60 session or legislative days to pass it and thereby get the benefit of expedited consideration procedures, retroactive nullification of an effective rule, and the limitation on an agency from promulgating a “substantially similar” rule without subsequent congressional authorization to do so by law.

The law provides an expedited consideration procedure for the Senate. If the committee to which a joint resolution is referred has not reported it out within 20 calendar days after referral, it may be discharged from further consideration by a written petition of 30 Members of the Senate, at which point the measure is placed on the calendar. After committee report or discharge it is in order at any time for a motion to proceed to consideration. All points of order against the joint resolution (and against consideration of the measure) are waived, and the motion is not subject to debate, amendment, postponement, or to a motion to proceed to other business. If the motion to consider is agreed to, it remains as unfinished business of the Senate until disposed of. Section 802(d)(1). Debate on the floor is limited to 10 hours. Amendments to the resolution and motions to postpone or to proceed to other business are not in order. Section 802(d)(2). At the conclusion of debate an up or down vote on the joint resolution is to be taken. Section 802(d)(3).⁹

⁸ For an in-depth discussion of procedural issues that may arise during House and Senate consideration of disapproval resolutions, see Richard S. Beth, CRS Report RL31160, *Disapproval of Regulations by Congress: Procedure Under the Congressional Review Act*, October 10, 2001 (CRA Procedure).

⁹ There is some question whether a motion to proceed is nondebatable because of the absence of language so stating. Arguably, the nondebatability of the motion is integral both to the scheme of the expedited procedure provisions as well as to the overall efficacy of the (continued...)

CRS-6

There is no special procedure for expedited consideration and processing of joint resolutions in the House. But if one House passes a joint resolution before the other House acts, the measure of the other House is not referred to a committee. The procedure of the House receiving a joint resolution "shall be the same as if no joint resolution had been received from the other House, but . . . the vote on final passage shall be on the joint resolution of the other House." Section 802(f)(1)(2).

Section 805 precludes judicial review of any "determination, finding, action or omission under this chapter." This would insulate from court review, for example, a determination by the OIRA Administrator that a rule is major or not, a presidential determination that a rule should become effective immediately, an agency determination that "good cause" requires a rule to go into effect at once, or a question as to the adequacy of a Comptroller General's assessment of an agency's report. The legislative history of this provision indicates that this preclusion of judicial review would not apply to a court challenge to a failure of an agency to report a rule. This appears not to be a judicially settled matter.¹⁰

Finally, the law provides a rule of construction providing that a reviewing court shall not draw any inference from a congressional failure to enact a joint resolution of disapproval with respect to such rule or a related statute. Section 801(g).

Utilization of the Review Mechanism Since 1996

As of March 24, 2006, the Comptroller General had submitted reports pursuant to section 801(a)(2)(A) to Congress on 610 major rules.¹¹ In addition, GAO had cataloged the submission of 41,218 non-major rules as required by Section 801 (a) (1) (A). To date, 37 joint resolutions of disapproval have been introduced relating to 28 rules. One rule, OSHA's ergonomics standard in March 2001, has been disapproved, an action that some believe to be unique to the circumstances of its passage. Two other rules have been disapproved by the Senate. One, the Federal Communication Commission's 2003 rule relating to broadcast media ownership was disapproved by the Senate during the 108th Congress but was not acted upon by the House. The second, a 2005 Department of Agriculture rule relating to the establishment of minimal risk zones for introduction of bovine spongiform

⁹ (...continued)

CRA's statutory scheme and thus may be implied. Alternatively, debate on such a motion may be limited by Section 803(d)(2) which limits debate on joint resolutions, as well as "all debatable motions," to 10 hours. Ultimately, a resolution of this question by the Senate Parliamentarian, or the Senate itself, may be necessary. However, at the commencement of the debate on S.J.Res. 6, to disapprove the ergonomics rule, the presiding officer declared that "The motion to proceed is not debatable. The question is on agreeing to the motion." The motion was agreed to. 147 Cong. Rec. S 1831 (daily ed. March 6, 2001). At least one other precedent exists in which it was ruled that a motion to proceed to a budget resolution under the Budget Act was nondebatable despite the silence of the act on the matter. *See*, 127 Cong. Rec. S 4871 (May 12, 1981).

¹⁰ See discussion *infra* at pp 24-29..

¹¹ General Accounting Office, Reports on Federal Agency Major Rules, which may be found at [<http://www.gao.gov/decisions/majrule/majrule.htm>].

CRS-7

encephalopathy (Mad Cow Disease) was disapproved on March 3, 2005, but its counterpart, H.J.Res. 23, has not yet been acted upon by the House. A third joint resolution, S.J.Res. 20, seeking disapproval of a rule promulgated by the Environmental Protection Agency to delist coal and oil-direct utility units from the new source category list under the Clean Air Act, was defeated in the Senate by a vote of 47-51 on September 13, 2005. The following chart details the subjects and actions taken on the introduced resolutions.

**Resolutions of Disapproval Introduced Under the Congressional Review Act
(April 1996 - March 2006)**

Date of Resolution	Number	Sponsor	Agency	Subject	Last Action
104th Congress					
9/17/1996	S.J.Res. 60	Sen. Trent Lott	HCFA/ HHS	Hospital reimbursement under Medicare	Failed in passage in Senate by UC
105th Congress					
3/4/1997	H.J.Res. 59	Rep. Don Young (+5)	USFWS/ DOI	Polar bear trophies from Canada	Hearing (House Committee on Resources)
3/20/1997	H.J.Res. 67 (<i>Same as S.J.Res. 25</i>)	Rep. Roger Wicker (+54)	OSHA/ DOL	Occupational exposure to methylene chloride	Referred to Subcommittee of House Committee on Education and the Workforce
4/10/97	S.J.Res. 25 (<i>Same as H.J.Res. 67</i>)	Sen. Thad Cochran (+5)	OSHA/ DOL	Occupational exposure to methylene chloride	Referred to Senate Committee on Labor and Human Resources
6/18/1997	H.J.Res. 81	Rep. Joe Scarborough	FCC	Revision of cable television leased commercial access rules	Referred to Subcommittee of House Committee on Commerce
6/10/98	S.J.Res. 50 (<i>Same as H.J.Res. 123</i>)	Sen. Christopher Bond	HCFA/ HHS	Surety bond requirements for home health agencies under Medicare and Medicaid programs	Referred to Senate Committee on Finance

CRS-8

Date of Resolution	Number	Sponsor	Agency	Subject	Last Action
6/17/1998	H.J. Res. 123 (Same as S.J. Res. 50)	Rep. Jim Nussle (+65)	HCFA/ HHS	Surety bond requirements for home health agencies under Medicare and Medicaid programs	Referred to Subcommittees of House Committees on Ways and Means and Commerce
106th Congress					
5/20/1999	H.J. Res. 55	Rep. Ron Paul (+68)	USPS	Delivery of mail to a commercial mail receiving agency	Referred to Subcommittee of House Committee on Government Reform
7/13/2000	H.J. Res. 104	Rep. Ron Paul	EPA	National pollutant discharge elimination system program and federal antidegradation policy and the water quality planning and management regulations concerning total maximum daily load	Referred to Subcommittee of House Committee on Transportation and Infrastructure
7/17/2000	S.J. Res. 50 (Same as H.J. Res. 106)	Sen. Michael Crapo (+18)	EPA	Water pollution under the total maximum daily load program	Referred to Senate Committee on Environment and Public Works
7/18/2000	H.J. Res. 105	Rep. Marion Berry (+23)	EPA	Total maximum daily loads under the Federal Water Pollution Control Act	Referred to Subcommittee of House Committee on Transportation and Infrastructure
7/18/2000	H.J. Res. 106 (Same as S.J. Res. 50)	Rep. Jay Dickey	EPA	Water pollution under the total maximum daily load program	Referred to Subcommittee of House Committee on Transportation and Infrastructure

CRS-9

Date of Resolution	Number	Sponsor	Agency	Subject	Last Action
107th Congress					
3/1/2001	S.J.Res. 6 <i>(same as H.J.Res. 35; H.Res. 79 provided for its consideration in the House)</i>	Sen. Don Nickles (+6)	OSHA/DOL	Ergonomics	Became P.L. 107-5 on 3/20/2001
3/7/2001	H.J.Res. 35 <i>(same as S.J.Res. 6)</i>	Rep. Ann Northrup (+32)	OSHA/DOL	Ergonomics	Referred to Subcommittee of House Committee on Education and Workforce
3/15/2001	H.J.Res. 38	Rep. Ron Paul (+14)	HHS	Standards for privacy of individually identifiable health information	Referred to Subcommittees of House Committees on Energy and Commerce, Ways and Means, and Education and the Workforce
3/20/2001	S.J.Res. 9 ¹	Sen. Barbara Boxer (+6)	USAID	Restoration of the Mexico City Policy	Referred to Committee on Foreign Relations
4/4/2001	H.J.Res. 43	Rep. Joe Knollenberg	DOE	Residential central air conditioners and heat pumps	Referred to Subcommittee of House Committee on Energy and Commerce
4/4/2001	H.J.Res. 44	Rep. Joe Knollenberg	DOE	Clothes washers	Referred to Subcommittee of House Committee on Energy and Commerce
5/22/2001	S.J.Res. 14	Sen. Barbara Boxer	EPA	Delay in the effective date of new arsenic standard	Referred to Senate Committee on Environment and Public Works

CRS-10

Date of Resolution	Number	Sponsor	Agency	Subject	Last Action
5/22/2001	S.J.Res. 15	Sen. Barbara Boxer	DOE	Postponement of the effective date of energy conservation standards for central air conditioners	Hearing by Senate Committee on Energy and Natural Resources (7/13/2001)
5/14/2002	H.J.Res. 92 (<i>Same as S.J.Res. 37</i>)	Rep. Eliot Engel (+56)	HHS	Modification of Medicaid upper payment limit for non-State government owned or operated hospitals	Referred to Subcommittee of House Committee on Energy and Commerce
5/14/2002	S.J.Res. 37 (<i>Same as H.J.Res. 92</i>)	Sen. Paul Wellstone (+13)	CMS/HHS	Modification of upper payment limit for non-State government owned or operated hospitals	Referred to Senate Committee on Finance
10/8/2002	S.J.Res. 48 (<i>Same as H.J.Res. 119</i>)	Sen. John McCain (+10)	FEC	Prohibited and excessive contributions: non-federal funds or soft money	Referred to Senate Committee on Rules and Administration
10/8/2002	H.J.Res. 119 (<i>Same as S.J.Res. 48</i>)	Rep. Christopher Shays (+1)	FEC	Prohibited and excessive contributions: non-federal funds or soft money	Referred to House Committee on House Administration
108th Congress					
1/7/2003	H.J.Res. 3	Rep. William Thomas (+106)	CMS/HHS	Revisions to payment policies under the Medicare physician fee schedule for calendar year 2003 and other items	Referred to House Committees on Energy and Commerce and Ways and Means

CRS-11

Date of Resolution	Number	Sponsor	Agency	Subject	Last Action
3/20/2003	H.J.Res. 41	Rep. Lane Evans	DVA	Acquisition procedures for health-care resources	Referred to House Committees on Veterans Affairs and Government Reform
5/22/2003	H.J.Res. 58	Rep. Thomas Trancendo (+7)	Treasury	Section 326(a) of USA PATRIOT ACT (acceptance of certain unverifiable forms of identification by financial institutions)	Referred to Subcommittee of House Committee on Financial Services
7/15/2003	S.J.Res. 17 (<i>Same as H.J.Res. 72</i>)	Sen. Byron Dorgan (+24)	FCC	Broadcast media ownership	Passed Senate without amendment by Yea-Nay vote (55-40); not acted on by the House
10/16/2003	H.J.Res. 72 (<i>Same as S.J.Res. 17</i>)	Rep. Maurice Hinchey (+2)	FCC	Broadcast media ownership	Referred to Subcommittee of House Committee on Energy and Commerce
4/7/2004	S.J.Res. 31 (<i>Same as H.R. 4236</i>)	Sen. John Edwards	OCC	Bank activities and regulations	Referred to Senate Committee on Banking, Housing, and Urban Affairs
4/7/2004	S.J.Res. 32 (<i>Same as H.R. 4237</i>)	Sen. John Edwards	OCC	Bank activities and regulations	Referred to Senate Committee on Banking, Housing, and Urban Affairs
4/28/2004	H.R. 4236 (<i>Same as S.J.Res. 31</i>)	Rep. Luis Gutierrez (+35)	OCC	Bank activities and regulations	Referred to Subcommittee of House Committee on Financial Services
4/28/2004	H.R. 4237 (<i>Same as S.J.Res. 32</i>)	Rep. Luis Gutierrez (+35)	OCC	Bank activities and regulations	Referred to Subcommittee of House Committee on Financial Services

CRS-12

Date of Resolution	Number	Sponsor	Agency	Subject	Last Action
109th Congress					
2/14/2005	S.J.Res. 4 (Same as H.J.Res. 24)	Sen. Kent Conrad (+8)	Agriculture	Establishment of minimal risk zones for introduction of mad cow disease	Passed Senate by 52-46 Yea-Nay vote 3/3/05; not acted on by House
2/17/2005	H.J.Res. 23 (Same as S.J.Res. 4)	Rep. Herseth (+1)	Agriculture	Establishment of minimal risk zones for introduction of mad cow disease	Referred to House Agriculture Committee. No action taken
6/29/2005	S.J.Res. 20 (Same as H.J.Res. 56)	Sen. Leahy (+31)	EPA	Removal of coal and oil-fired generating units from list of major sources of hazardous pollutants	Defeated in Senate by 47-51 vote, 9/13/05
6/29/2005	H.J.Res. 56 (Same as S.J.Res. 20)	Rep. Meehan (+4)	EPA	Removal of coal and oil-fired generating units from list of major sources of hazardous pollutants	Referred to Committee on Energy and Commerce. No action taken

Note: Not included in this tabulation are bills designed to disapprove agency rules but that were not joint resolutions under the Congressional Review Act. For example, H.R. 3735, introduced on April 28, 1998, by Rep. Ron Paul, was intended to disapprove a rule requiring the use of bycatch reduction devices in the shrimp fishery of the Gulf of Mexico. The bill was in response to Amendment 9 to the Fishery Management Plan for the Shrimp Fishery of the Gulf of Mexico, issued as a final rule implementing the amendment on April 14, 1998. The bill's findings section indicated that approval of the amendment was inconsistent with the requirements of the Magnuson-Stevens Fishery Conservation Act and the Administrative Procedure Act. The disapproval section indicated that the rule "shall have no force or effect."

1. On June 22, 2001, Senator Boxer also introduced S.J.Res. 17, which was intended to disapprove a memorandum issued by the President on March 29, 2001, (66 FR 17301) restoring the Mexico City Policy. However, the Congressional Review Act does not apply to actions by the President. See text at pp. 16-17.

OSHA's ergonomics standard had been controversial since the publication of its initial proposal for rulemaking in 1992 during the Bush Administration.¹² OSHA circulated a draft proposal in 1994 which was met with strong opposition from business interests and the formation of an umbrella organization, the National

¹² The turbulent history of the development of the ergonomics standard is recounted in CRS Report 97-724, *Ergonomics in the Workplace: Is It Time for an OSHA Standard?*

CRS-13

Coalition on Ergonomics, to oppose its adoption. In 1995 OSHA circulated a modified draft proposal, particularly with respect to coverage and regulatory requirements. At the same time, congressional opposition resulted in appropriations riders that prohibited OSHA from promulgating proposed or final ergonomics proposals during the fiscal years 1995, 1996, and 1998.¹³ The riders did not prohibit OSHA from continuing its development work, however, which included responding to concerns that scientific knowledge of ergonomics was inadequate for rulemaking and that the cost of industry implementation of a broad standard would be extraordinarily costly. Congress mandated reports from the National Academy of Sciences which found a significant statistical link between workplace exposures and musculoskeletal disorders, but also noted that the exact causative factors and mechanisms are not understood. In 2000, congressional attempts to pass another appropriation rider, as well as stand alone prohibitory legislation, failed, and on November 14, 2000, OSHA issued its final standard which became effective on January 16, 2001.¹⁴ Most employer responsibilities under the new standard, however, were not to begin until October, 2001.

As soon as the rule was issued two industry groups filed suit in the Court of Appeal for the District of Columbia Circuit challenging OSHA's authority to issue the rule, its failure to follow proper procedures, the rationality of its provisions, and the adequacy of its scientific and economics analyses. The intervening 2000 elections also altered the political situation with the election of a president and effective control of both Houses of Congress in the same political party. Opponents of the standard introduced a resolution of disapproval under the CRA, S.J.Res. 16, on March 1, 2001. A discharge petition was filed on March 5, and debate on and passage of the resolution occurred on March 6 by a vote of 56-44. That evening the House Rules Committee issued a rule for floor action the next day, and after an hour of debate H.J.Res. 35 was passed on March 7 by a vote of 223-206. The President signed the nullifying measure into law on March 20, 2002.¹⁵

In sum, the veto of the ergonomics standards could be seen as the product of an unusual, confluence of factors and events: control of both Houses of Congress and the presidency by the same party, the longstanding opposition by these political actors, as well as by broad components of the industry to be regulated, to the ergonomics standards, and the willingness and encouragement of a president seeking to undo a contentious, end-of-term rule from a previous administration.

In all other cases, if there is any discernible pattern to the introduced resolutions, it is to exert pressure on the subject agencies to modify or withdraw the rule, or to elicit support of members, which in some instances was successful. For example, H.J.Res. 67 (1997) was aimed at disapproving an Occupational Health and Safety Administration (OSHA) rule setting exposure limits on methylene chloride, a paint stripper used in the furniture and airplane industries. Its sponsor, Representative Roger Wicker, contended that the rule would harm small businesses without

¹³ In a close floor vote, the rider proposed for FY1997 was deleted.

¹⁴ 65 Fed. Reg. 68261 (2000).

¹⁵ P.L. 107-5.

CRS-14

increasing protections for workers. The disapproval resolution never received a floor vote. But the Congressman succeeded in effecting a compromise through the inclusion of provisions in the FY1998 Labor, HHS and Education appropriations measure¹⁶ which required OSHA to provide on-site assistance for companies to comply with the new rules without fear of penalty. Mr. Wicker is reported to have stated that he used the disapproval resolution as a vehicle to gather support from influential members, including the chairs of the House Appropriations and Commerce Committees.¹⁷

The disapproval resolution mechanism was effectively utilized to accomplish the suspension of a highly controversial rulemaking by the then-Health Care Financing Administration (HCFA). In January 1998, HCFA issued a rule requiring that home health agencies (HHAs) participating in the Medicare program must obtain a surety bond that is the greater of \$50,000 or 15 percent of the annual amount paid to the HHA by the Medicare program. In addition, a new HHA entering the Medicare or Medicaid program after January 1, 1998, had to meet a capitalization requirement by showing it actually had available sufficient capital to start and operate the HHA for the first three months. The rule was issued without the usual public participation through notice and comment and was made immediately effective. Substantial opposition to the rule quickly surfaced from both surety and HHA industry representatives. HCFA attempted to remedy the complaints by twice amending the rule, in March and in June, but was unsuccessful in quelling the industry-wide concerns. On June 10, Senator Bond, for himself and 13 other co-sponsors, introduced S.J.Res. 50 to disapprove the June 1 HCFA rule. Within a short period, the disapproval resolution had garnered 52 sponsors. On June 17, a companion bill, H.J.Res. 123, was introduced in the House. Thereafter, members of the staffs of Senators Bond, Baucus, and Grassley (all members of the Senate Finance Committee with jurisdiction over the agency) met with HCFA officials and concluded an agreement that (1) the agency would suspend its June 1, 1998 rule indefinitely; (2) a General Accounting Office report would be requested by the committee that would study the issues surrounding the surety bond requirement; (3) on completion and issuance of the GAO report, HCFA would work in consultation with the Congress about the surety bond requirement; and (4) any new rule would not be effective earlier than February 15, 1999, and would be preceded by at least 60 days prior notice. The agreement was memorialized in a June 26 letter to HCFA signed by Senators Bond, Baucus and Grassley.¹⁸ The GAO report was issued on January 29, 1999, but the rule suspension was never lifted. No floor vote on the disapproval resolutions occurred in either House.

Another illustration of the manner in which the review mechanism has been utilized is shown by S.J.Res. 60 (1996), concerning another HCFA rule, this one dealing with the agency's annual revision of the rates for reimbursement of Medicare providers (doctors and hospitals), which normally would have been effective on

¹⁶ P.L. 105-78.

¹⁷ See Allan Freedman, "GOP's Secret Weapon Against Regulations: Finesse," *CQ Weekly*, September 5, 1998, at 2318-19 (Freedman).

¹⁸ Freedman, *supra* note 17, at 2319-20.

CRS-15

October 1, 1996. HCFA, however, submitted the rule to Congress on August 30, 1996, and since it was a major rule, it could not go into effect for 60 days, or until October 29, which meant there would be a significant loss of revenues because the differential rate increases could not be imposed for most of the month of October. Section 801(a)(5), however, provides that if a joint resolution of disapproval is rejected by one House, "the effective date of a rule shall not be delayed by operation of this chapter..." On the morning of September 17, 1996, Senator Lott introduced S.J.Res. 60 and that afternoon, by unanimous consent, the resolution "was deemed not passed."¹⁹ The HCFA rule went into effect on October 1 as scheduled.

A final interesting utilization of the CRA process that had an impact and resulted in an unusual outcome, involved President George W. Bush's restoration, on February 15, 2001, of President Reagan's so-called Mexico City Policy, which limited the use of federal and non-federal monies by non-governmental organizations (NGOs) to directly fund foreign population planning programs which support abortion or abortion-related activities. President Clinton had rescinded the 1984 Reagan policy when he took office in January 1993.²⁰ A president's authority to determine the terms and conditions on which such NGOs may engage in foreign population planning programs derives from the Foreign Assistance Act of 1961.²¹ The provision vests the authority to make these determinations exclusively in the Chief Executive. President Reagan delegated his authority to make the determinations to the Administrator of the U.S. Agency for International Development (AID), who issued regulations that specified the conditions upon which grants would be given to NGOs. Thus, when the Mexico City Policy was rescinded in 1993, it was the AID Administrator that did it, at the direction of President Clinton. When President Bush restored it in 2001, he did it in a directive to the AID Administrator²² who simply revived the old conditions by internal agency administrative action.

A number of Senate opponents of the policy filed a disapproval resolution on March 20, 2001, S.J.Res. 9, to nullify the Administrator's action, reasoning that it was a covered rule under the CRA since the implementing action was taken by an executive agency official and not by the President himself, and thus was reviewable by Congress.²³ The President responded by rescinding his earlier directive to the AID Administrator and thereafter issuing an executive directive under his statutory authority personally implementing the necessary conditions and limitations for NGO

¹⁹ See 142 Cong. Rec. S 10723 (daily ed. Sept. 17, 1996).

²⁰ 29 Weekly Comp. Pres. Doc. 88 (1993).

²¹ 22 U.S.C. 2151b(b) and b(f)(1) (2000).

²² 37 Weekly Comp. Pres. Doc. 216 (2001).

²³ Compare *Franklin v. Massachusetts*, 505 U.S. 788, 800 (1992) and *Dalton v. Specter*, 511 U.S. 462, 469 (1994), holding that the President is not subject to APA procedures since he is not expressly covered by its definition of agency, with *Chamber of Commerce v. Reich*, 74 F.3d 1311 (D.C. Cir. 1998) and *National Family Planning Council v. Sullivan*, 979 F.2d 227 (D.C. Cir. 1992), allowing challenges to agency rules that were issued pursuant to presidential directive.

CRS-16

grants.²⁴ The presidential action mooted the disapproval resolution, and rendered a subsequent attempt to veto by S.J.Res. 17 ineffective because the CRA does not reach such actions by the President.

Discussion

In the ten years since its passage, the CRA process has been used sparingly. Several criticisms and questions concerning the process have been raised by those supporting the wider use of the regulatory disapproving mechanism. These have included a need for a screening mechanism for submitted rules; the absence of an expedited procedure in the House of Representatives for consideration of disapproval resolutions; the deterrent effect of the need for a supermajority to overcome a veto; the scope of the law's coverage; the judicial enforceability of its key requirements; whether a disapproval resolution may be directed at part of a rule; and the effect of a rule nullification on future agency rulemaking in the same area, which, critics believe, have introduced uncertainties and impediments to concerning the use of the process.

1. Lack of a Screening Mechanism to Pinpoint Rules That Need Congressional Review; Proposals for Change.

Proponents of an expanded use of the CRA process have called for screening mechanism that will alert committees to rules that may raise important or sensitive substantive issues. In this view, their perceived lack prevents busy committees from prioritizing such issues. As indicated above, the Comptroller General's reports on major rules serve as check lists as to whether legally required agency tasks have been done and not as substantive assessments of whether they were done properly or whether the rules accord with congressional intent.

Lack of knowledge of the *existence* of such sensitive rules by jurisdictional committees or interested Members is rarely the case. What critics say is absent is in-depth scrutiny and analysis of individual rules by an authoritative and presumably neutral source that may provide the basis for triggering meaningful congressional review.

Support for an independent substantive screening body was signaled by the introduction by Representative Sue Kelly of H.R. 1704 in the 105th Congress, a bill that would have established a Congressional Office of Regulatory Analysis.²⁵ The bill was referred to the House Judiciary and Governmental Reform and Oversight Committees both of which favorably reported differing versions of the legislation.²⁶ Both versions would have established an independent Congressional Office of Regulatory Analysis (CORA) to be headed by a director appointed by the House

²⁴ See, Restoration of the Mexico City Policy: Memorandum for the Administrator of the U.S. Agency for International Development, March 28, 2001, 66 Fed. Reg. 17303-17313 (March 29, 2001).

²⁵ A companion bill, S. 1675, was introduced in the Senate by Senators Shelby and Bond. 143 Cong. Rec. S1007 (daily ed. Feb. 25, 1998).

²⁶ See H.Rept. 105-441, Parts 1 and 2 (105th Cong., 2d Sess.) (1998).

CRS-17

Speaker and the Senate Majority Leader for a term of four years, with service in the office limited to no more than three terms. The current review functions of the Comptroller General under the CRA and the Congressional Budget Office under the Unfunded Mandates Act of 1995 would be transferred to the proposed CORA. The Judiciary Committee's version, in addition to having the Office make "an assessment of an agency's compliance with the procedural steps for 'major rules'" required by CRA, directs the proposed CORA to "conduct its own regulatory impact of these 'major rules.'"²⁷ The bill as reported by the Government Reform Committee would have allowed the CORA director to use "any data and analyses generated by the Federal agency and any data of the Office" in analyzing the submitted rule. Both bills provided that a similar analysis of non-major rules was to be conducted when requested to do so by a House or Senate Committee or by individual members of either House. First priority for the conduct of such analyses was given to all major rules. Secondary priority was assigned to committee requests. Tertiary priority was given individual member requests. Finally, under the Judiciary Committee version, the report was to be furnished within 45 days after Congress receives notification of the rule; the Governmental Reform bill would have allowed 30 days. H.R. 1704 received no floor action during the 105th Congress.

Critics maintain that an independent office of regulatory analysis would serve the congressional need for objective information necessary to evaluate agency regulations. In their view, it would also provide credibility and impetus for wider utilization of the review mechanism. Further, by providing intensive review of certain non-major rules, the possibility of OIRA "hiding" significant rules by not designating them as "major" is forestalled. Those opposing the establishment of an office of this kind might argue that creation of a new congressional bureaucracy for review purposes would be unnecessarily duplicative of what the agencies have already done as well as extraordinarily expensive. The requirement of the Judiciary Committee's version that a CORA do its own cost-benefit analysis from scratch could be pointed to as an unknown cost factor, as well as a task that may not be possible to perform adequately within the allotted 45 days.

Congress agreed upon a limited test of the CORA concept, late in the 106th Congress, with the passage of the Truth in Regulating Act of 2000.²⁸ That legislation established a three year pilot project for the General Accounting Office (now renamed the Government Accountability Office (GAO)) to report to Congress on economically significant rules. Under this pilot program, whenever an agency published an economically significant proposed or final rule a chairman or ranking minority member of a committee of jurisdiction of either House of Congress may request the Comptroller General (CG) to review the rule. The CG was to report on each rule within 180 calendar days. The report had to contain an "independent evaluation" by the CG of the agency's cost-benefit analysis. We are aware of only one request ever made pursuant to the provision. That was submitted in January 2001 by the chairs of the jurisdictional committees of the House and Senate with respect to the Department of Agriculture's forest planning and roadless area rule. GAO advised the requesters that although Act authorized \$5.2 million per year for

²⁷ Section 4 (a)(3)(A).

²⁸ P.L. 106-312, 114 Stat. 1248-50, 5 U.S.C. 801 note.

CRS-18

the program, no monies had been appropriated and it could not proceed with the request. No further action was taken on the request and Congress never enacted an appropriation, thereby forestalling implementation of the project. It may be noted that the 180-day reporting period did not mesh exactly with the time period under the CRA for consideration of rules subject to resolution of disapproval, although completed requests for analyses of *proposed* rules might coincide with such reviews. In any event, the pilot program established by the act expired in January 2004.

In the 109th Congress, Representative Sue Kelly introduced H.R. 1167, which would make permanent the authority of Congress to request GAO to perform regulatory analyses. The new Truth in Regulating Act (TIRA), if enacted as a permanent responsibility of GAO, would not appear that require a specific appropriation to require agency performance of the vested task as was the case when it was established as a "pilot project." It would, in effect, be an unfunded mandate. Although GAO currently does (and historically has always done) some reviews of agencies' rules at Members' requests under its current appropriations, both the volume and nature of the reviews are likely to be substantially different and may affect its ability to conduct other agency reviews. A similar bill, H.R. 725, section 5, would also make TIRA permanent, but would authorize up to \$5 million for the revenues. Although GAO may view this bill as preferable, if the authorized funds are not appropriated, GAO could be in the same "unfunded mandate" situation as it would under H.R. 1167.

In an apparent attempt to avoid the criticisms of the CORA model and to remedy some of the perceived impediments to the effectiveness of the CRA, Representative Ginny Brown-Waite introduced H.R. 3356, the Joint Administrative Procedures Committee Act of 2003, in the 108th Congress which would amend the CRA by establishing a joint congressional committee with broad authority to investigate, evaluate and recommend actions with respect to the development of proposed rules, the amendment or repeal of existing rules, and disapproval of final rules submitted for review under the CRA.²⁰ The responsibilities are in addition to the current statutory framework providing for review of new rules that are required to be reported. A new provision permits the joint committee to recommend disapproval of new rules to jurisdictional committees. The proposed Joint Administrative Procedures Committee (JAPC) would be composed of 12 members from each House with no more than 7 from one political party, selected by the Senate Majority Leader and the Speaker of the House. The JAPC would receive all agency submissions of covered rules and provide copies to all jurisdictional committees. The JAPC has sixty days to consider the rule. The agency could be required to submit such reports as is required by the joint committee such as a cost-benefit analysis or risk assessment. If no action is taken by JAPC, the rule may go into effect. If a majority determines that rule is inconsistent with congressional intent in the area, JAPC may recommend a disapproval resolution to the House and Senate jurisdictional committees. In its report to the jurisdictional committees JAPC is to pinpoint the objectionable provisions of the rule. The proposal would establish a new expedited consideration procedure for disapproval resolutions in the House of

²⁰ See introductory remarks on the measure at 147 Cong. Rec. II 2454 (daily ed. Oct. 21, 2003).

CRS-19

Representatives. On the third legislative day after a joint resolution is recommended by JACP, it is in order for any member of the House to move to proceed to consideration of the disapproval resolution. It is a privileged, non-debatable motion and once agreed to must be considered before any other business under expedited procedures. Only one hour of debate would be allowed. Finally, Section 801(b)(2) of the CRA is amended to provide that an agency may promulgate a new rule without new statutory authorization if it carries out the recommendation set forth in the report submitted by the JACP to the jurisdictional committees. The bill was referred to the House Committees on Rules and Judiciary. The Judiciary Committee referred it to its Subcommittee on Commercial and Administrative Law. No action was taken by either Committee. Representative Brown-Waite's proposal was reintroduced in the 109th Congress as H.R. 3148 but has received no action as yet.

Another bill, H.R. 576, introduced by Representative Ney in the 109th Congress, is similar in many respects to H.R. 3148, but quite different in certain fundamental ways. Both would create a 24 member House-Senate joint committee capable of holding hearings, requiring the attendance of witnesses, and making rules regarding its organization and procedures. Both also provide for an expedited consideration procedure in the House. Significant differences appear, however, with respect to the roles assigned to the joint committees. Under H.R. 3148, the current process established by the CRA for congressional review of new agency rules is maintained: required reports on new rulemakings are submitted to each House and such reports are sent to the jurisdictional committees of each House for action. Rules required to be reported are also sent to the joint committee. Special rules are provided for discharge from committees in the Senate and, under proposed H.R. 3148, from House committees. Expedited procedures are in effect for floor proceedings in each House. The only part to be played by the joint committee in the new rule review process under H.R. 3148 is to recommend to jurisdictional committees that certain submitted new rules be subject to disapproval resolutions. Deference to the current roles of jurisdictional committees is also maintained under H.R. 3148 with respect to the new duties given to the joint committee to selectively review existing federal agency rules in effect before the enactment of the CRA and existing major rules of federal agencies promulgated since April 1996. The joint committee may only recommend to jurisdictional committees that they take appropriate legislative action to amend or repeal such laws.

Under H.R. 576, the joint committee, rather than the jurisdictional committees of each House, receives the report of covered rules submitted for review by federal agencies as well as cost-benefit analyses and other materials. Jurisdictional committees receive copies of these materials from the joint committee. GAO is to submit its report on major rules to the joint committee, not the jurisdictional committees concerned. Major rules take effect no earlier than 60 days after the rule is published in the Federal Register or is received by the joint committee. Joint resolutions of disapproval are reported by the joint committee to the respective Houses for action. The joint committee may also report "by bill ... recommendations with respect to matters within the jurisdiction of their respective Houses which are referred to the joint committee or otherwise within the jurisdiction of the joint committee." It would appear, then, that the joint committee would have the predominant role in the congressional review process, which might inject a highly controversial issue - - diminution of the role of jurisdictional committees - - in a

CRS-20

reform debate already freighted with difficult and sensitive political and legal considerations.

A third bill introduced in the 109th Congress is H.R. 931, by Representative Hayworth, would prohibit any regulation proposed by a federal agency from going into effect until a bill enacted under expedited consideration procedures applicable to the rule is signed into law. The term "regulation" is given the broad meaning of the term "rule" as defined in 5 U.S.C. 551(4). The bill does not specifically reference the current CRA process. In fact, it would supercede it and require rulemaking agencies to seek approval of all covered "regulations." There is no provision for congressional processing in a timely and expeditious manner a potentially huge number of proposed regulations.

2. Lack of an Expedited House Procedure.

Those unsatisfied with the current procedure indicate that the current absence of an expedited consideration procedure in the House of Representatives may well be a factor affecting use of the process in that body since, as a practical matter, it will mean engaging the House leadership each time a rule is deemed important enough by a committee or group of Members to seek speedy access to the floor. In view of the limits both on floor time and the ability to gain the attention of the leadership, it is argued that only the most well situated in the body will be able to gain access within the limited period of review.³⁰ It is also maintained that a perception that no action will be taken in the House might deter Senate action.

3. The Deterrent Effect of the Ultimate Need for a Supermajority to Veto a Rule.

A consideration that critics maintain limits expanded use of the full CRA review mechanism has been the realization that any joint resolution disapproving a rule that does not have the support of the administration would be vetoed and require a two-thirds vote in each House to override. The deterrent potential of the need for a supermajority in each House to overcome a presidential veto is likely to be significant, unless the object of the exercise is simply to provide the impetus for informal accommodations, such as occurred in the HCFRA surety bond matter, or to influence Members to support alternative legislation. Critics assert that a realization by agencies over time that passage of a disapproval resolution is highly unlikely could substantially reduce the efficacy of such a threat. Additionally, they maintain that a possible consequence of such an assumption is that agencies will not factor in congressional disapproval as part of the rule development process.³¹ Since the

³⁰ The experience with respect to the repeal of the ergonomics standard, discussed *supra* at 12-13, would appear to bear this out.

³¹ See, Mark Seidenfeld, *The Psychology of Accountability and Political Review of Agency Rules*, 51 *Duke L.J.* 1059, 1089 (2001) ("The paucity of motions for disapproval resolutions indicates that agencies are not apt to focus on fast-track review as a check on their rulemaking discretion at least until late in the rulemaking process. Agencies might be likely to focus on such review when they adopt rules that they know will be unpopular in (continued...)")

ergonomics veto, 19 resolutions of disapproval with respect to 14 rules have been introduced, only one of which has been acted upon (by one House),³² which some see as a return to the prior practice of using the mechanism to facilitate bargaining.

Thus, even with the successful disapproval of the ergonomics standard, critics are concerned that the supermajority hurdle still remains. One solution they have proposed is to establish a multi-tiered disapproval mechanism. That is, instead of all rules, major or non-major, being treated equally in that they can only be overturned by a joint resolution of disapproval, a process in which the entire burden of action is on the Congress, some rules might be designated for more selective, special review. For example, they argue that major or significant rules might be subject to a joint resolution of *approval*. Under such a scheme a major or significant rule would not become effective unless a joint resolution approving it passed both Houses within a specified period of time.³³ To make such a scheme effective someone or some body, other than the OIRA Administrator or a congressional agency, such as the proposed CORA, might be vested with the authority to designate which rules are “major” or “significant” and thereby subject to the affirmative approval requirement. A benefit from the critics’ standpoint is that the burden for supporting and justifying such rules falls on the promulgating agencies. All other rules would be subject to disapproval resolutions. Another proposal is to subject all covered rules to congressional approval and establish an expedited procedure whereby non-controversial rules may be sped through leaving only a few for close consideration.³⁴

4. The Reluctance to Disapprove an Omnibus Rule Where Only One Part of the Rule Raises Objection.

Section 808 of the review provision sets forth the mandatory text of any joint resolution of disapproval: “That Congress disapproves the rule submitted by the _____ relating _____, and such rule shall have no force or effect. (The blank spaces being appropriately filled in).” The quoted text refers to “the rule” and

³¹ (...continued)

Congress, but even then they need not fear the ramifications of fast-track review unless they also believe that the president opposes the rule or is willing to compromise it to win other political battles. Fast-track review may have greater significance for midnight rules that are subject to review when a different president is in office.”)(Seidenfeld).

³² S.J.Res. 17, dealing with the FCC’s media ownership rule, which passed in the Senate but was not acted upon in the House.

³³ See e.g., Reorganization Act Amendments of 1984, providing that both Houses of Congress had to pass a joint resolution approving a reorganization plan within 90 days of continuous session after the date of presidential submission or else it is deemed disapproved. 5 U.S.C. 906 (a) (1994).

³⁴ Two bills introduced in the 106th Congress to revise the CRA utilized the joint resolution of approval approach. See S. 1348, 106th Cong., 1st Sess. (1999)(Sen. Brownback) S. 2670, 106th Cong., 2nd Sess. (2000)(Sen. Thomas). A similar approach is reflected in H.R. 110 introduced by Rep. Hayworth (with 25 co-sponsors) in the 108th Congress. All agency rules must be reported to Congress and may become effective only on passage, by means of a fast-track procedure applicable to both Houses, of an approval law, which is not subject to judicial review.

CRS-22

“such rule,” indicating a rule in its entirety. The experience of 33 joint resolutions of disapproval thus far introduced is that the first blank is filled with the name of the promulgating agency and the second with a generic title or description of the rule.³⁵ Similarly, the text of the review provision refers to “such rule,” “a rule,” or “the rule,” with no language expressly referring to a part of any rule under review. The procedure leading to a vote on the proposed disapproval resolution allows for no amendments, and the final vote is up or down on the joint resolution as introduced.

The legislative history of the provision is similarly uniform in using language that would ordinarily indicate a reference to a submitted rule in its entirety, except in one instance. During a discussion of the Section 802 procedure that would obtain when one House completes its action on a joint resolution and sends it to the other House before the second House has yet to complete any action, the following comment is made:

... Subsection 802(f) sets forth one unique provision that does not expire in either House. Subsection 802(f) provides procedures for passage of a joint resolution of disapproval when one House passes a joint resolution and transmits it to the other House that has not yet completed action. In both Houses, the joint resolution of the first House to act shall not be referred to a committee but shall be held at the desk. In the Senate, a House-passed resolution may be considered directly only under normal Senate procedures, regardless of when it is received by the Senate. A resolution of disapproval that originated in the Senate may be considered under the expedited procedures only during the period specified in subsection 802(c). Regardless of the procedures used to consider a joint resolution in either House, the final vote of the second House shall be on the joint resolution of the first House (no matter when that vote takes place). *If the second House passes the resolution, no conference is necessary and the joint resolution will be presented to the President for his signature. Subsection 802(f) is justified because subsection 802(a) sets forth the required language of a joint resolution in each House, and thus, permits little variance in the joint resolutions that could be introduced in each House.*³⁶ (Emphasis supplied).

³⁵ S.J.Res. 50 and H.J.Res. 123, “relating to surety bond requirements for home health agencies under the medicare and medicaid programs....”

³⁶ Joint Explanatory Statement of House and Senate Sponsors, 142 Cong. Rec. E 571, at E 577 (daily ed. April 19, 1996); 142 Cong. Rec. S 3683, at S 3686 (daily ed. April 18, 1996)(Legislative History)(emphasis added). These identical detailed explanations by the legislative sponsors of the intent and scope of the CRA’s provisions appeared in the daily editions of the Congressional Record some three weeks after SBREFA was signed into law. In the absence of committee hearings and the sparse commentary during floor debate, these explanations represent the most authoritative contemporary understanding of the provisions of the law. It is, however, post-enactment legislative history and does not carry the weight that committee report explanations and floor debates provide. As one court dealing with the interpretation of a CRA provision stated, the post-enactment legislative history “buttresses the ‘limited scope’ of the CRA judicial review provision” but warned that “the lack of formal legislative history for the CRA makes reliance on this joint statement troublesome.” See *United States v. Southern Indiana Gas & Electric Co.*, discussed *infra* at note 54 and accompanying text. It has recently come to our attention that the permanent edition of the Congressional Record for the 104th Congress places the Senate sponsors Joint Explanation at April 18, 1996, the same date it appeared in daily edition. See 142 Cong. Rec. 8196- (continued...)

The last two sentences as seen by some as raising uncertainty. The next to last sentence would appear to contemplate the possibility of a conference to resolve differences in resolutions. The last sentence minimizes what those differences could be. Some have suggested that the explanation contemplates that parts of rules may be the subject of disapproval resolutions, arguing that the framers of the provision would have known that many rules are complex and contain a variety of provisions, only one or a few of which may be objectionable, and would not have required a whole rulemaking to be brought down simply because of one offending portion out of many. It has also been argued that in light of the Section 801(b)(2) prohibition against agency issuance of a rule “in substantially the same form” after passage of a disapproval resolution unless Congress by subsequent law authorizes it, not allowing rejection of part of a rule would have a draconian result.

In fact, an up or down vote on the entire rule would appear to have been the intent of the framers of the review provision. The language and structure of the provision, and the supporting explanation of the legislative history, contemplates a speedy, definitive and limited process. It is not unlike the legislative processes created for congressional actions dealing with military base closings,³⁷ international trade agreements,³⁸ and presidential reorganization plans,³⁹ among others. Each dealt with complex, politically sensitive decisions which allowed only an up or down vote by the Congress on the entire package presented. It was understood that piecemeal consideration would delay and perhaps obstruct legislative resolution of the issues before it. For similar reasons, the statutory structure and legislative history of the review provision strongly indicate that Congress intended the process to focus on submitted rules as a whole and not to allow veto of individual parts. Perhaps a proper reading of the quoted portion of the legislative history is that it was contemplating the possibility that the blank to be filled in after “relating to” might have different generic descriptions of the rule subject to disapproval. A broader reading of these sentences would not otherwise appear warranted by either the legislative language itself or the rest of the explanatory legislative history.

As a practical matter, if this reading is correct it may be a factor in the limited use of the mechanism. As indicated, nullifying a rule means disabling an agency from regulating in the area covered by the rule unless Congress passes further authorization legislation, a significant consequence of any disapproval action. On the other hand, expressly authorizing nullification of portions of a rule might allow

³⁶ (...continued)

8201. The House sponsors’ Joint Explanation, which originally appeared in the daily edition of April 19, 1996, is now placed during the floor debate on SBREFA on March 28, 1996, the date of its passage. See 142 Cong. Rec. 6922-6930. There is no explanation for the earlier placement. As a consequence, we have determined to continue to treat the Joint Explanation as post-enactment legislative history that arguably merits close consideration by a reviewing court as a contemporaneous, detailed, in-depth statement of purpose and intent by the principal sponsors of the law. See discussion, *infra*, at pp. 27-33.

³⁷ Defense Base Closure and Realignment Act of 1990, P.L. 101-510, sec. 2908 (b) 104 Stat. 1808, in note following 10 U.S.C. 2687 (2000).

³⁸ See, 19 U.S.C. 2191-2193 (2000).

³⁹ See, e.g., Reorganization Act of 1984, 5 U.S.C. 909-912 (2000).

competing disapproval resolutions within each House and the certainty of a long, drawn out conference with the possibility of no agreement.

5. The Uncertainty of Which Rules Are Covered By the CRA.

The framers of the congressional review provision intentionally adopted the broadest possible definition of the term “rule” when they incorporated Section 551(4) of the APA. As indicated previously,⁴⁰ the legislative history of Section 551(4) and the case law interpreting it make it clear that it was meant to encompass all substantive rulemaking documents — such as policy statements, guidances, manuals, circulars, memoranda, bulletins and the like — which as a legal or practical matter an agency wishes to make binding on the affected public.

The legislative history of the CRA emphasizes that by adoption of the Section 551 (4) definition of rule, the review process would not be limited only to coverage of rules required to comply with the notice and comment provisions of the APA or any other statutorily required variation of notice and comment procedures, but would rather encompass a wider spectrum of agency activities characterized by their effect on the regulated public: “The committee’s intent in these subsections is . . . to include matters that substantially affect the rights or obligations of outside parties. The essential focus of this inquiry is not on the type of rule but on its effect on the rights and obligations of non-agency parties.”⁴¹ The framers of the legislation indicated their awareness of the practice of agencies avoiding the notification and public participation requirements of APA notice-and-comment rulemaking by utilizing the issuance of other, non-legislative documents as a means of binding the public, either legally or practically,⁴² and noted that it was the intent of the legislation to subject just such documents to congressional scrutiny:

... The committees are concerned that some agencies have attempted to circumvent notice-and-comment requirements by trying to give legal effect to general statements of policy, “guidelines,” and agency policy and procedure manuals. The committees admonish the agencies that the APA’s broad definition of “rule” was adopted by the authors of this legislation to discourage circumvention of the requirements of chapter 8.⁴³

It is likely that virtually all the 35,490 non-major rules thus far reported to the Comptroller General have been either notice and comment rules or agency documents required to be published in the Federal Register. This would mean that

⁴⁰ See footnotes 1-4, *supra*, and accompanying text.

⁴¹ Legislative History, *supra* n. 36, at E 579, S 3687.

⁴² This practice has been long recognized and criticized in administrative law commentaries. See, e.g., Robert A. Anthony, Interpretive Rules, Policy Statements, Guidances, Manuals, and the Like — Should Federal Agencies Use Them To Bind The Public?, 41 Duke L.J. 1311 (1992). Cf. also, General Accounting Office, Federal Rulemaking: Agencies Often Published Final Actions Without Proposed Rules, GAO/GGD-98-126 (August 1998).

⁴³ Legislative History, *supra* n. 36, at E 578, S 3687.

perhaps thousands of covered rules have not been submitted for review.⁴⁴ Pinning down a concrete number is difficult since such covered documents are rarely if ever published in the Federal Register and thus will come to the attention of committees or Members only serendipitously.

Eight such agency actions have come to the attention of committee chairmen and Members and were referred to the Comptroller General for determinations whether they were covered rules. In five of the eight cases the CG determined the action documents to be covered rules. See letter to Honorable Lane Evans, Ranking Minority Member, House Committee on Veterans' Affairs, B-292045 (May 19, 2003) (Department of Veterans Affairs memorandum terminating the Department's Vendee Loan Program is not a rule that must be submitted to Congress because it is exempt under Section 804(3)(B) and (C) as a rule relating to "agency management" or "agency organization, procedure, or practice that does not substantially affect the rights or obligations of non-agency parties."); letter to Honorable Ted Strickland, B-291906 (February 28, 2003) (Department of Veterans Affairs memorandum instructing all directors of health care networks to cease any marketing activities to enroll new veterans in such networks is excluded from CRA coverage by Section 804(3)(C) which excludes "any agency rule of agency organization, procedure, or practice that does not substantially affect the rights or obligations of non-agency parties."); letter to Honorable Doug Osc, Chairman, House Subcommittee on Energy Policy, Natural Resources, and Regulatory Affairs, Committee on Government Reform, B-287557 (May 14, 2001) (Department of Interior's Fish and Wildlife Service's Trinity River "Record of Decision" is a rule covered by the CRA because it is an agency statement of general applicability and future effect designed to implement, interpret, or prescribe law or policy and is an "agency action[]" that substantially affect[s] the rights and obligations of outside parties."); letter to the Hon. James A. Leach, Chairman, House Banking Committee, B-286338 (October 17, 2000) (Farm Credit Administration's national charter initiative held to be a rule under the CRA); letter to Honorable David M. McIntosh, Chairman, Subcommittee on National Economic Growth, Natural Resources, and Regulatory Affairs, House Committee on Government Reform and Oversight, B-281575 (January 20, 1999) (EPA "Interim Guidance for Investigating Title VI Administrative Complaints Challenging Permits" held to be covered because it created new, mandatory steps in the procedure for handling disparate impact assessments which gave recipients new rights they did not previously possess for obtaining complaint dismissals, a substantive alteration of the previous regulation.); letter to Senator Conrad Burns, B-278224 (November 10, 1997) (the American Heritage River Initiative announced by the Council on Environmental Quality was not a covered rule because it was established by presidential executive order and direction and the President is not an

⁴⁴ An indication of the vast number of unreported covered rules came as a result of an investigation by the House Subcommittee on National Economic Growth, Natural Resources, and Regulatory Affairs (Government Reform) which revealed that 7,523 guidance documents issued by the Department of Labor, the Environmental Protection Agency, and the Department of Transportation which were of general applicability and future effect had not been submitted for CRA review during the period March 1996 through November 1999. See "Non-Binding Legal Effect of Agency Guidance Documents," <http://www.congress.gov/cgi-bin/cpquery/T?&report=hr1009&dbname=cp106&> [H.Rept. 106-1009, 106th Cong., 2nd Sess. (2000)].

CRS-26

“agency” under the APA and is not subject to the provisions of the APA); letter to Honorable Ted Stevens, Chairman, Senate Appropriations Committee, et al, B-275178 (July 3, 1997) (Tongass National Forest Land and Resources Management Plan held an agency statement of general applicability and future effect that implements, interprets, and prescribes law and policy); letter to Honorable Larry Craig, Chairman, Senate Committee on Energy and Resources, B-274505 (September 16, 1996) (memorandum of Secretary of Agriculture concerning the Emergency Salvage Timber Sale Program held to be a covered rule because it is of general applicability and interprets and implements the statutory program.).

The GAO opinion on the American Heritage River Initiative rests its rationale that a presidential directive to an agency that results in substantive action by that agency is not thereby covered by the CRA based on the Supreme Court’s rulings in *Franklin v. Massachusetts*, 505 U.S. 788, 800 (1992) and *Dalton v. Spector*, 511 U.S. 462, 469 (1994). In light of *Chamber of Commerce v. Reich*, 74 F. 3d 1322 (D.C. Cir. 1996) and *National Family Planning v. Sullivan*, 979 F. 2d 227 (1992), which successfully challenged substantive changes in rules that were directed by a presidential directive, the GAO General Counsel’s conclusions may be problematic.

Also questionable is the General Counsel’s analysis in its February 28, 2003 opinion concluding that a Department of Veterans Affairs (DVA) memo terminating a long-time veterans health outreach program was an exempt agency practice that had no substantial effect on the rights of non-agency parties. In contrast with its May 19, 2004, opinion dealing with a termination of a DVA vendee loan program, where it closely examined the statutory basis of the loan program and found that it was established on the basis of *discretionary* authority of the Secretary and provided no direct benefits to veterans, the General Counsel made no mention that the Congress had charged the Secretary of DVA “with the affirmative duty of seeking out eligible veterans and eligible dependants and providing them” with federal benefits and services. Representative Strickland joined with the Vietnam Veterans of America in a suit seeking declaratory and injunctive relief to restore the program. In *Vietnam Veterans of America v. Principi*, 2005 WL 961133 (D.D.C. March 11, 2005), the district court found that “[u]nder 38 U.S.C. 7721, 7722, and 7227, Congress charges the Secretary of the Department of Veterans Affairs with the affirmative duty to ‘provide outreach services.’ This duty is not discretionary but must be done in accordance with Congress’ wishes.” The court concluded, however, that since Congress appropriated a lump-sum for both outreach services and health care services, and the record showed that some monies had been expended for outreach services, it indicated that Congress meant to allow the Secretary the discretion to decide “the manner in which [outreach services] are to be provided.” The critique here is that the Comptroller General’s failure to examine the Secretary’s duty under the statute in question eliminated the possibility finding a substantial effect of the agency’s action on the rights or obligations of non-agency parties, thereby forestalling the opportunity for legislative review under CRA procedures. It is interesting to note that subsequent to the CG’s decision and the filing of the lawsuit, Congress enacted a limitation on the Fiscal Year 2004 VA appropriation stating, “[n]one of the funds made available may be used to implement any policy prohibiting the Directors of the Veterans Integrated Service Networks from conducting outreach or marketing to enroll new veterans within their respective networks,” an apparent

CRS-27

indication that Congress thought the controverted policy could be having an impact on potential beneficiaries. See Pub.L. 108-199, H.R. 2673, sec. 418 (2004).

Believing such instances to be only a small portion of unreported agency actions, GAO, at the behest of the House Government Reform and Oversight Subcommittee on National Economic Growth, Natural Resources, and Regulatory Affairs, engaged in discussions with the Office of Management (OMB) during 1998 for the creation of a uniform reporting form for use by agencies in reporting covered rules to the CG, and for the promulgation of an OMB guidance document covering such matters under the review provision as the definition of a covered rule, reporting requirements, the good cause exemption, and the consequences of failing to report a rule, among others. The failure to issue such guidance prompted insertion of the following directive in the FY1999 appropriation for OMB: "OMB is directed to submit a report by March 31, 1999, to the Committees on Appropriations, the Senate Committee on Governmental Affairs, and the House Committee on Government Reform and Oversight that . . . issues guidance on the requirements of 5 U.S.C. Sec. 801 (a) (1) and (3); sections 804 (3), and 808 (2), including a standard new rule reporting form for use under section 801 (a)(1)(A)-(B)."⁴⁵ OMB, in the view of the Subcommittee, has failed to substantially comply with that statutory directive.⁴⁶

If the guidance issued in compliance with the statutory direction is not consonant with the congressional understanding of the intent, meaning and scope of the congressional review provision, it might be considered as a vehicle for oversight hearings and possible remedial legislation.

6. The Uncertainty of the Effect of An Agency's Failure to Report a Covered Rule to Congress.

Section 801(a)(1)(A) of the CRA provides that "[b]efore a rule can take effect," the Federal agency promulgating such rule shall submit to each House of Congress and the Comptroller General a report containing the text of the rule, a description of the rule, including whether it is a major rule, and its proposed effective date. Section 805 states that "no determination, finding, action or omission under this chapter shall be subject to judicial review." The Department of Justice (DOJ) has broadly hinted that the language of Section 805 "precluding judicial review is unusually sweeping" so that it would presumably prevent judicial scrutiny and sanction of an agency's failure to report a covered rule.⁴⁷ DOJ has succeeded with its preclusion argument in two federal district court rulings. More recently the rationale of those opinions has been called into question and rejected by a third district court.

⁴⁵ P.L. 105-277, Division A, title III.

⁴⁶ See <http://www.congress.gov/cgi-bin/cpquery/T?&report=hr1009&dbname=cp106&> H.Rept. 106-1009, *supra* n. 44 at 4-5.

⁴⁷ See letter dated June 11, 1997 to the Honorable Lamar Smith, Chairman, Subcommittee on Immigration and Claims, Senate Judiciary Committee, from Andrew Fois, Assistant Attorney General, Office of Legislative Affairs, DOJ, and accompanying analysis dated June 10, 1997, at pp 9-11 (DOJ Memorandum).

CRS-28

In *Texas Savings and Community Bankers Assoc. v. Federal Housing Finance Board*,⁴⁸ three thrift associations and two of their trade associations sued the Federal Housing Finance Board challenging one of its policies regarding the home mortgage lending industry. The plaintiff's argued, *inter alia*, that the policy was a rule required to be reported to Congress under the CRA and the failure to report it precluded its enforcement. The government argued that Section 805 was a blanket preclusion of judicial review. In response to plaintiff's contention that Section 805 only precluded review of any "determination, finding, or omission" by Congress, the court held that "the statute provides for no judicial review of any 'any determination, finding, action or omission under this chapter,' not 'by Congress under this chapter.'" The court must follow the plain English. Apparently, Congress seeks to enforce the [CRA] without the able assistance of the courts."⁴⁹ The court made no reference to the scheme of the act or its legislative history.

The Texas district court's "plain meaning" rationale was cited with approval by an Ohio district in *United States v. American Electric Power Service Corp.*⁵⁰ That case was one of many involving an extensive litigation campaign by the Environmental Protection Agency (EPA), begun in the mid-1990's to establish the extent to which a power plant or factory may alter its facilities or operations without bringing about a "modification" of that emission source so as to trigger the Clean Air Act's New Source Performance Standards and pre-construction "new source review."⁵¹ Among the issues common in these cases, and raised in this case, was whether EPA's determination to begin a campaign of litigation enforcement after many years of no enforcement was a substantive change that had to be reported to Congress under the CRA. It was among 123 affirmative defenses raised by defendants, nine coal-fired power plants in Ohio, Virginia, and West Virginia, which the Government moved to dismiss. Citing the *Texas Savings* case approvingly, the district court agreed "that the language of Section 805 is plain" and that "[d]eparture from the plain language is appropriate in the 'rare cases [in which] the literal application of a statute would produce a result demonstrably at odds with the intention of its drafters ... or when the statutory language is ambiguous.' ... In all other cases, the plain meaning of the statute controls."⁵² The court did not indicate whether it had attempted to discern whether there was any evidence of congressional intent at odds with the court's plain meaning reading. It did, however, provide an alternative rationale: "Furthermore, this Court is not convinced that the instant

⁴⁸ 1998 U.S. Dist. LEXIS 13470, 1998 WL842 181 (W. Texas), aff'd 201 F.3d 551 (5th Cir. 2000).

⁴⁹ *Id.* at note 15.

⁵⁰ 218 F.Supp. 3d 931 (S.D. Ohio 2002).

⁵¹ For background on the legal development of the issue, see Robert Meltz, "Air Pollution: Legal Perspective on the 'Routine Maintenance' Exception to New Source Review," CRS Report RS21424 (February 20, 2004).

⁵² 218 F.Supp. 2d at 949.

enforcement action amounts to rulemaking which would be covered by 5 U.S.C. 801 *et. seq.*, in the first instance,” without elaboration.⁵³

In *United States v. Southern Indiana Gas and Electric Co.*,⁵⁴ the court faced the same issue in a motion for summary judgment by the power company defendant. Rejecting the *Texas Savings* and *American Electric Power* precedents, it found that Section 805 is ambiguous and susceptible to two possible meanings: that Congress did not intend for any court review of an agency's compliance with the CRA or that Congress only intended to preclude judicial review of its own determination, findings, actions or omissions made under the CRA *after* a rule had been submitted to it for review. Adopting the first alternative, argued for by the Government and adopted by the *Texas Savings* and *American Electric Power* courts, would, according to the court, allow agencies “to evade the strictures of the CRA by simply not reporting new rules and courts would be barred from reviewing their lack of compliance. This result would be at odds with the purpose of the CRA, which is to provide a check on administrative agencies’ power to set policies and essentially legislate without Congressional oversight. The CRA has no enforcement mechanism, and to read it to preclude a court from reviewing whether an agency rule is in effect that should have been reported would render the statute ineffectual.”⁵⁵ The court found that the post-enactment legislative history “buttresses the ‘limited scope’ of the CRA’s judicial review provision” but was careful to acknowledge that “the lack of formal legislative history for the CRA makes reliance on this joint statement troublesome.” However, the court made it clear that “this court reached its conclusion about the limited scope of the judicial review provision of the CRA based on the text of the statute and overall purpose of the act. The legislative history only serves to further reinforce the Court’s conclusion.”⁵⁶

It is certainly arguable that the *Southern Indiana* court’s view of the limited preclusiveness of Section 805 is plausible and persuasive. Indeed, an even stronger case can be made from a closer analysis of the text and structure of the act taken as a whole. Moreover, although the court was correct as a general matter that post-enactment legislative history normally is given less weight, there are a number of Supreme Court rulings that recognize that under certain circumstances, arguably applicable here, contemporaneous explanations of key provisions’ intent have been found to be an “authoritative guide” to a statute’s construction. In one instance the Court relied on an explanation given eight years after the passage of the legislation.

The plain, overarching purpose of the review provision of the CRA was to assure that all covered final rulemaking actions of agencies would come before Congress for scrutiny and possible nullification through joint resolutions of disapproval.⁵⁷ The scheme provides for the delayed effectiveness of some rules

⁵³ *Id.*

⁵⁴ 2002 U.S. Dist. LEXIS 20936; 55 ERC (BNA) 1597 (D.C. S.D. Ind. 2002).

⁵⁵ 2002 U.S. Dist. LEXIS 20936 at 13-14.

⁵⁶ *Id.* at 15-16 and note 3.

⁵⁷ “This legislation establishes a government-wide congressional review mechanism for most
(continued...) ”

CRS-30

deemed innately important ("major rules"), Section 801(a)(3), and temporarily waives the submission requirement of Section 801 for rules establishing, modifying, opening, closing or conducting a regulatory program for a commercial, recreational, or subsistence activity related to hunting, fishing, or camping, or for a rule an agency "for good cause" finds that notice and public procedure are impractical, unnecessary, or contrary to the public interest. Section 808. Rules promulgated pursuant to the Telecommunications Act of 1996 are excluded from the definition of "major rule". But all such rules must ultimately be submitted for review. And while the scheme anticipates that some (or even most) rules will go into effect before a joint resolution of disapproval is passed, the law provides that enactment of a joint resolution terminates the effectiveness of the rule and that the rule will be treated as though it had never taken effect. Sections 801(b)(1), 801(f). Further, a rule that has been nullified cannot be reissued by an agency in substantially the same form unless it is specifically authorized to do so by law after the date of the disapproval. Section 801(b)(2).

The review scheme also requires a variety of actions by persons or agencies in support of the review process, and time for such actions to be scrutinized by both Houses to implement the scheme. Thus, the Comptroller General must submit a report to Congress on each major rule submitted within 15 calendar days after its submission or publication of the rule (Section 801(a)(2)(A)); the Administrator of OIRA determines whether a rule is a "major rule" (Section 804(2)); and after a rule is reported the Senate has 60 session days, and the House 60 legislative days, to pass a disapproval resolution under expedited procedures. Section 802. But Congress has preserved for itself a period of review of at least 60 session or legislative days. Therefore, if a rule is reported within 60 session days of the Senate (or 60 legislative days of the House) prior to the date Congress adjourns a session of the Congress, the period during which Congress may consider and pass a joint resolution of disapproval is extended to the next succeeding session of the Congress. Section 801(d)(1).

Thus the statutory scheme is geared toward congressional review of all covered rules at some time; and a reading of the statute that allows for easy avoidance defeats that purpose. Interpreting the judicial review preclusion provision to prevent court scrutiny of the validity of administrative enforcement of covered but non-submitted rules appears to be neither a natural nor warranted reading of the provision. Section 805 speaks to "determination[s], finding[s], action[s], or omission[s] *under this chapter*," a plain reference to the range of actions authorized or required as part of the review process. Thus Congress arguably did not intend, as is more fully described below, to subject to judicial scrutiny, its own internal procedures, the validity of Presidential determinations that rules should become effective immediately for specified reasons, the propriety of OIRA determinations whether rules are major or not, or whether the Comptroller General properly performed his reporting function. These are matters that Congress can remedy by itself. However,

⁵⁷ (...continued)

new rules. This allows Congress the opportunity to review a rule before it takes effect and to disapprove any rule to which Congress objects." Legislative History, *supra* note 36, at E 575 and S 3683.

CRS-31

without the potential of court invalidation of enforcement actions based on the failure to submit covered rules, agencies are not likely to comply with submission requirements. If Section 805 is read so broadly, it would arguably render ineffective as well the Section 801(b)(2) prohibition against an agency promulgating a new rule that is “substantially the same” as a disapproved rule unless it “is specifically reauthorized by a law enacted after” the passage of a disapproval resolution. It is more than likely that a determination whether a new or reissued rule is “substantially the same” as a disapproved rule is one that a court will be asked to make.⁵⁸ Congress appears to have contemplated (and approved) judicial review in this and other situations when it provided in Section 801(g) that “[i]f Congress does not enact a joint resolution of disapproval under section 802 respecting a rule, no court or agency may infer any interest of the Congress from any action or inaction of the Congress with regard to such rule, related statute, or joint resolution of disapproval.”

The legislative history of the review provision confirms this view of the limited reach of the judicial review preclusion language. A key sponsor (Representative Hyde) of the legislation, Representative McIntosh, explained during the floor debate on H.R. 3136 that “Under Section 8(a)(1)(A), covered rules may not go into effect until the relevant agency submits a copy of the rule and an accompanying report to both Houses of Congress.”⁵⁹

Shortly thereafter, the principal Senate and House sponsors of H.R. 3136 published a Joint Explanatory Statement in the Congressional Record providing a detailed explanation of the provisions of the congressional review provision of the CRA and its legislative history. Senator Nickles explained:

Mr. NICKLES. Mr. President, I will submit for the RECORD a statement which serves to provide a detailed explanation and a legislative history for the congressional review title of H.R. 3136, the Small Business Regulatory Enforcement Fairness Act of 1996. H.R. 3136 was passed by the Senate on March 28, 1996, and was signed by the President the next day . . . Because title III of H.R. 3136 was the product of negotiation with the Senate and did not go through the committee process, no other expression of its legislative history exists other than the joint statement made by Senator REID and myself immediately before passage of H.R. 3136 on March 28. I am submitting a joint statement to be printed in the RECORD on behalf of myself, as the sponsor of the S. 219, Senator REID, the prime co-sponsor of S. 219, and Senator STEVENS, the chairman of the Committee on Governmental Affairs. This joint statement is intended to provide guidance to the agencies, the courts, and other interested parties when interpreting the act's terms. The same statement has been

⁵⁸ The disapproval of the ergonomics rule underlines a possible need for judicial review in certain instances where enforcement is necessary and appropriate to support the statutory scheme. That rule, which was broad and encompassing in its regulatory scope, raises the question as to how far can the agency go before it reaches the point of substantial similarity in its promulgation of a substitute. This issue is addressed in the next section.

⁵⁹ 142 Cong. Rec. H3005 (daily ed. March 28, 1996).

CRS-32

submitted today in the House by the chairmen of the committees of jurisdiction over the congressional review legislation.⁶⁰

The Joint Explanatory Statement is clear as to the scope and limitation of the judicial review provision:

Limitation on judicial review of congressional or administrative actions

Section 805 provides that a court may not review any congressional or administrative "determination, finding, action, or omission under this chapter". Thus, the major rule determinations made by the Administrator of the Office of Information and Regulatory Affairs of the Office of Management and Budget are not subject to judicial review. Nor may a court review whether Congress complied with the congressional review procedures in this chapter. This latter limitation on the scope of judicial review was drafted in recognition of the constitutional right of each House of Congress to "determine the Rules of its Proceedings". U.S. Const. art. I, §5, cl. 2, which includes each house being the final arbiter of compliance with such Rules.

The limitation on a court's review of subsidiary determinations or compliance with congressional procedures, however, does not bar a court from giving effect to a resolution of disapproval that was enacted into law. A court with proper jurisdiction may treat the congressional enactment of a joint resolution of disapproval as it would treat the enactment of any other federal law. Thus, a court with proper jurisdiction may review the resolution of disapproval and the law that authorized the disapproved rule to determine whether the issuing agency has the legal authority to issue a substantially different rule. The language of subsection 801(g) is also instructive. Subsection 801(g) prohibits a court or agency from inferring any intent of the Congress only when "Congress does not enact a joint resolution of disapproval", or by implication, when it has not yet done so. In deciding cases or controversies properly before it, a court or agency must give effect to the intent of the Congress when such a resolution is enacted and becomes the law of the land. The limitation on judicial review in no way prohibits a court from determining whether a rule is in effect. For example, the authors expect that a court might recognize that a rule has no legal effect due to the operation of subsections 801(a)(1)(A) or 801(a)(3).⁶¹

The Justice Department has suggested that such post-enactment legislative history should not carry any weight, particularly in view of the unambiguous nature of the preclusion language at issue.⁶² However, as discussed below, the courts appear to have taken a contrary view in analogous interpretive situations.

The Joint Explanatory Statement is a contemporaneous explanation of the congressional review provision by the legislative sponsors of the legislation which is consonant with the text and structure of the legislation. Such statements by legislative sponsors have been described by the Supreme Court as an "authoritative guide to the statute's construction." *North Haven Bd. of Education v. Bell*, 456 U.S.

⁶⁰ Legislative History, *supra* note 36, at 142 Cong. Rec. S 3683.

⁶¹ *Id.*, at E 577 and S 3686.

⁶² See DOJ memorandum, *supra* n. 47, at 10 n.14.

CRS-33

512, 526-27 (1982)(citing a bill summary placed in the Congressional Record by the bill's sponsor after passage, and explanatory remarks made two years later by the same sponsor); *Pacific Gas & Electric Co. v. Energy Resources Conservation and Development Commission*, 461 U.S. 190, 211 n. 23 (1983)(relying on a 1965 explanation by "an important figure in the drafting of the 1957 [Atomic Energy Act]"); *Grove City College v. Bell*, 465 U.S. 555, 567 (1984)(remarks of sponsors deemed authoritative when they are consistent with the language of the legislation).

Finally it may be noted that analogous preclusion of judicial review provisions in the original Paperwork Reduction Act of 1980, P.L. 96-511 and in the 1995 revision of the act, P.L. 104-13, have been uniformly construed by the courts to allow enforcement of its public protection provision. Thus 44 U.S.C. 3504 (1994), which authorized the Director of OMB to review and approve or disapprove information collection requirements in agency rules, and to assign control numbers to such forms, provided that "there shall be no judicial review of any kind of the Director's decision to approve or not to act upon a collection of information requirement contained in an agency rule." 44 U.S.C. 3504(h)(9). A similar provision appears in the 1995 revision of the Paperwork Reduction Act.⁶³ The 1980 legislation also contained a "public protection" provision which absolved a person from any penalty for not complying with an information collection request if the form did not display an OMB control number or failed to state that the request was not subject to the act.⁶⁴ The public protection provision, Section 3512, has been the subject of numerous court actions, some finding it applicable and providing a complete defense to noncompliance, others finding it inapplicable. But no court has ever raised a question with respect to preclusion of judicial review.⁶⁵

A reviewing court construing the language of the congressional review provision, the structure of the legislation, and its legislative history, including post-enactment statements, is therefore likely to hold that a court is not precluded from preventing an agency from enforcing a covered rule that was not reported to Congress in compliance with Section 801(a)(1)(A).

7. The Uncertainty of the Breadth of the Prohibition Against An Agency's Promulgation of a "Substantially Similar" Rule After the Original Rule Has Been Vetoed.

Enactment into law of a disapproval resolution has several important consequences. First, a disapproved rule is deemed not to have had any effect at any time. Thus, even a rule that has become effective for any period of time is

⁶³ 44 U.S.C. 3507(d)(6)(2000).

⁶⁴ See 44 U.S.C. 3512 (1994).

⁶⁵ Compare *United States v. Smith*, 866 F.2d 1092 (9th Cir. 1980)(failure of Forest Service to file a plan of operations with OMB control number precluded conviction for failure to file) and *Cameron v. IRS*, 593 F.Supp. 1540, *aff'd* 773 F.2d 126 (6th Cir. 1984)(failure of IRS forms to have OMB control numbers did not violate section since it was a collection of information during the investigation of a specific individual or entity which is exempt under the provision).

CRS-34

retroactively negated.⁶⁶ Second, a rule that does not take effect, or is not continued because of the passage of a disapproval resolution, cannot be “reissued in the same form” nor can a “new rule” that is “substantially the same” as the disapproved rule be issued unless such action is specifically authorized by a law enacted subsequent to the disapproval of the original rule.⁶⁷ The full text of this provision states:

(2) A rule that does not take effect (or does not continue) under paragraph (1) may not be reissued in substantially the same form, and a new rule that is substantially the same as such a rule may not be issued, unless the reissued or new rule is specifically authorized by a law enacted after the date of the joint resolution disapproving the original rule.

Finally, if a rule that is subject to any statutory, regulatory or judicial deadline for its promulgation is not allowed to take effect, or is terminated by the passage of a joint resolution, any deadline is extended for one year after the date of enactment of the disapproval resolution.⁶⁸

It can be anticipated that opponents of a disapproval resolution will argue that successful passage of a resolution may disable an agency from ever promulgating rules in the “area” covered by the resolution without future legislative reauthorization since a successful disapproval resolution must necessarily bring down the entire rule. Or, at the very least, it may be contended that any future attempt by the agency to promulgate new rules with respect to the subject matter will be subject to judicial challenge by regulated persons who may claim that either the new rules are substantially the same as those disapproved or that the statute provides no meaningful standard to discern whether a new rule is substantially the same and that the agency must await congressional guidance in the form of a statute before it can engage in further rulemaking in the area. The practical effect of these arguments, then, may be to dissuade an agency from taking any action until Congress provides clear authorization.

A review of the CRA’s statutory scheme and structure, the contemporaneous congressional explanation of the legislative intent with respect to the provisions in question, the lessons learned from the experience of the March 2001 disapproval of the OSHA ergonomics rule, and the application of pertinent case law and statutory construction principles suggests that (1) It is doubtful that Congress intended that all disapproved rules would require statutory reauthorization before further agency action could take place. For example, it appears that Congress anticipated further rulemaking, without new authorization, where the statute in question established a deadline for promulgating implementing rules in a particular area. In such instances, the CRA extends the deadline for promulgation for one year from the date of disapproval. (2) A close reading of the statute, together with its contemporaneous congressional explication, arguably provides workable standards for agencies to reform disapproved regulations that are likely to be taken into account by reviewing courts. Those standards would require a reviewing court to assess both the nature of

⁶⁶ 5 U.S.C. 801(f).

⁶⁷ 5 U.S.C. 801(b)(2).

⁶⁸ 5 U.S.C. 803.

CRS-35

the rulemaking authority vested in the agency that promulgated the disapproved rule and the specificity with which the Congress identified the objectionable portions of a rule during the floor debates on disapproval. An important factor in a judicial assessment may be the CRA's recognition of the continued efficacy of statutory deadlines for promulgating specified rules by extending such deadlines for one year after disapproval. (3) The novelty of the issue, the uncertainty of the weight a court will accord the post enactment congressional explanation, and the current judicial inclination to give deference to the "plain meaning" of legislative language, make it difficult to reliably anticipate what a court is likely to hold.

A blanket contention that enactment of a joint resolution disapproving an agency's rules would disable that agency from promulgating future rules in the "area" of concern until Congress passes new legislation authorizing it to issue rules on that subject would not appear to have a substantial basis in the CRA. Such argumentation would apparently be based on the notion that the "plain meaning" of the CRA's disapproval mechanism forecloses further rulemaking with respect to that subject matter unless Congress specifically reauthorizes such action in subsequent legislation. That is, since Congress can apparently only disapprove a rule as a whole, rather than pinpointing any particular portions, there is no sound basis for the agency to act without further legislative guidance where a rule deals exclusively with an integrated subject matter. The statute gives no indication as to how an agency is to discern what actions would be "substantially the same" and it would run the risk of a successful court challenge if it guessed wrong. It might be further argued that even if the agency promulgates new rules, which of course would be subject to CRA scrutiny, and Congress did not act to disapprove the new rules, that would not provide the necessary reauthorization since Section 301(g) of the act provides as a rule of construction that in the event of the failure of Congress to disapprove a rule "no court ... may infer any intent of Congress from any action or inaction of the Congress with regard to such, related statute, or joint resolution of disapproval."

It is, of course, fundamental that statutory language is the starting point in any case of statutory construction. In recent years, the Supreme Court has shown a strong disposition to hold Congress to the letter of the language it uses in its enactments. In its ruling in *Barnhart v. Sigmon Coal Co.*,⁶⁹ the Court advised that the first step "is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case."⁷⁰ "The inquiry ceases 'if the statutory language is unambiguous and the statutory scheme is coherent and consistent,'"⁷¹ In such cases, the Court has held, resort to "legislative history is irrelevant to the interpretation of an unambiguous statute."⁷² In *Barnhart* the Court

⁶⁹ 534 U.S. 438 (2002).

⁷⁰ *Id.* at 450.

⁷¹ *Id.*

⁷² *Davis v. Michigan Dept. of Treasury*, 489 U.S. 803, 808-09 n.3. *Accord Connecticut National Bank v. Germain*, 503 U.S. 249, 253-54 (1992); *United States v. Daas*, 198 F.2d 1167, 1175 (9th Cir. 1999), *cert. denied* 531 U.S. 999 (2000).

CRS-36

warned, “parties should not seek to amend [a] statute by appeal to the Judicial Branch.”⁷³

The plain meaning rule, however, is not an unalterable, rigid rule of construction and has been held inapplicable where it would “lead to an absurd result,”⁷⁴ or “would bring about an end completely at variance with the purpose of the statute.”⁷⁵ “It is ‘a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme’ ... Thus it is a more faithful construction of [a statute] to read it as a whole, rather than as containing two unrelated parts. It is the classic judicial task of construing related statutory provisions to make sense in combination.”⁷⁶ In the instant situation, it is arguably not likely that a court would hold that the “substantially the same” language of Section 801(b)(2) is unambiguous, either on its face or in the context of the statutory scheme. The direction of the provision is not a self-enforcing mandate; it clearly requires a further determination whether rules have been reissued in “substantially the same form” or whether a new rule is “substantially the same” as the one disapproved. The ambiguity raised is who makes those determinations and on what basis.

The language of the provision, however, does not naturally or ineluctably lead to the conclusion that no further remedial rulemaking can take place unless Congress passes a new law. This reasoning is buttressed by Section 803(a) which contemplates that agency rulemaking must take place after a disapproval action if the authorizing legislation of the agency mandates that rules disapproved had to have been promulgated by a date certain. That provision extends the deadline for promulgation for one year “after the date of enactment of the joint resolution,” not one year after Congress reauthorizes action in the area. The reasonable conclusion is that Congress understood that after disapproval, an agency, if it was under a mandate to produce a particular rule, had to try again. The question then is, how was it to perform this task. The answer lies in the legislative history of the act.

The Congressional Review Act was part of Title II of the Small Business Regulatory Enforcement Fairness Act of 1996. That Title was a product of negotiation between the Senate and House and did not go through the committee process. Thus there is no detailed expression of its legislative history, apart from floor statements by key House and Senate sponsors, before its passage by the Congress on March 28, 1996 and its signing into law by the President on March 29. Thereafter, the principal sponsors of the legislation in the Senate (Senators Nickles, Reid and Stevens) and House (Representative Hyde) submitted identical joint explanatory statements for publication in the Congressional Record “intended to provide guidance to the agencies, the courts, and other interested parties when

⁷³ 534 U.S. at 462..

⁷⁴ *Holy Trinity Church v. United States*, 143 U.S. 457, 459 (1892).

⁷⁵ *United Steelworkers v. Weber*, 443 U.S. 193, 201 (1978).

⁷⁶ *United States v. Wilson*, 290 F.3d 347 (D.C. Cir. 2002) (holding, *inter alia*, that it is appropriate for a court to look at the history and background against which Congress was legislating).

CRS-37

interpreting the act's terms."⁷⁷ Although it is a post-enactment explanation of the legislation, it is likely to be accorded some weight as a contemporaneous, detailed, in-depth statement of purpose and intent by the principal sponsors of the law.⁷⁸

The Joint Explanatory Statement directly addresses a number of issues that may arise upon enactment of a disapproval resolution and attempts to provide guidance for both Congress and agencies faced with repromulgation questions. At the outset, the Statement notes that disapprovals may have differing impacts on promulgating agencies depending on the nature and scope the rulemaking authority that was utilized. For example, if an agency's authorizing legislation did not mandate the promulgation of the disapproved rule, and the legislation gives the agency broad discretion, the authors deem it likely that it has the discretion whether or not to promulgate a new rule. On the other hand, the Statement explains that "if an agency is mandated to promulgate a particular rule and its discretion is narrowly circumscribed, the enactment of a resolution of disapproval for that rule may work to prohibit the reissuance of any rule."⁷⁹ By implication, a congressional mandate to issue regulations that is not circumscribed would still be operative. But how would the agency be guided in that circumstance? The Statement addresses that very question: it is the obligation of Congress during the debate on the disapproval resolution "to focus on the law that authorized the rule and make the congressional intent clear regarding the agency's options or lack thereof after the enactment of a joint resolution of disapproval."⁸⁰ Thereafter, "the agency must give effect to the resolution of disapproval."⁸¹ The full statement on the issue is as follows:

Effect of enactment of a joint resolution of disapproval

Subsection 801(b)(1) provides that "A rule shall not take effect (or continue), if the Congress enacts a joint resolution of disapproval, described under section 802, of the rule." Subsection 801(b)(2) provides that such a disapproval rule "may not be reissued in substantially the same form, and a new rule that is substantially the same as such a rule may not be issued, unless the reissued or new rule is specifically authorized by a law enacted after the date of the joint resolution disapproving the original rule." Subsection 801(b)(2) is necessary to prevent circumvention of a resolution disapproval. Nevertheless, it may have a different impact on the issuing agencies depending on the nature of the underlying law that authorized the rule.

If the law that authorized the disapproved rule provides broad discretion to the issuing agency regarding the substance of such rule, the agency may exercise its broad discretion to issue a substantially different rule. If the law that authorized the disapproved rule did not mandate the promulgation of any rule, the issuing

⁷⁷ Legislative History, *supra*, n. 36.

⁷⁸ See e.g., *North Haven Bd. of Education v. Bell*, 456 U.S. 512, 530-31 (1982); *Pacific Gas & Electric Co. v. Energy Resources Conservation & Development Commission*, 461 U.S. 190, 220 n.23 (1983); *Grove City College v. Bell*, 465 U.S. 555, 567 (1984).

⁷⁹ Legislative History *supra* note 36 at S 3686.

⁸⁰ *Id.*

⁸¹ *Id.*

CRS-38

agency may exercise its discretion not to issue any new rule. Depending on the law that authorized the rule, an issuing agency may have both options. But if an agency is mandated to promulgate a particular rule and its discretion in issuing the rule is narrowly circumscribed, the enactment of a resolution of disapproval for that rule may work to prohibit the reissuance of any rule. The authors intend the debate on any resolution of disapproval to focus on the law that authorized the rule and make the congressional intent clear regarding the agency's options or lack thereof after enactment of a joint resolution of disapproval. It will be the agency's responsibility in the first instance when promulgating the rule to determine the range of discretion afforded under the original law and whether the law authorizes the agency to issue a substantially different rule. Then, the agency must give effect to the resolution of disapproval.

The congressional experience with the disapproval of the OSHA ergonomics standard provides a useful lesson.⁸² This rule became the first, and only, rule to be disapproved thus far under the CRA. The principal sponsor of the resolution, Senator Jeffords, at the outset of the debate addressed the issue whether disapproval would disable OSHA from promulgating a new rule. Senator Jeffords referred to the above-discussed Joint Statement and noted that OSHA "has enormously broad regulatory authority," citing pertinent sections of the OSH Act providing expansive rulemaking authority. The Senator concluded that "I am convinced that the CRA will not act as an impediment to OSHA *should* the agency decide to engage in ergonomics rulemaking."⁸³ What Senator Jeffords apparently understood was that while the agency had broad authority to promulgate rules, there was no congressional mandate to issue an ergonomics rule in the underlying law. As a consequence it was possible that no further rulemaking would occur, as implied by a letter to Senator Jeffords from Secretary Chao which indicated that a new rulemaking was only one of many options available to the Department should the rule be disapproved.⁸⁴ In fact, OSHA made it clear on April 5, 2002, that no rulemaking was in the offing.⁸⁵ On April 17, 2002, Senator Breaux and 26 co-sponsors, many of whom had voted in favor of the disapproval resolution, introduced S. 2184, which would direct the Secretary of Labor to promulgate a new ergonomics rule and specifies in detail what should be included, what should not be included, and what evidence should be considered. Section 1 (b)(4) of the bill deems the direction to issue the rule "a specific authorization by Congress in accordance with Section 801 (b)(2)" of the CRA.⁸⁶

An interesting contrast with the ergonomics situation was the consideration given by the key Senate sponsors of the Bipartisan Campaign Reform Act 2002 (BCRA),⁸⁷ which requires that the Federal Election Commission (FEC) promulgate rules implementing the soft money limitations and prohibitions of Title I of the act

⁸² See CRS Ergonomics Report, *supra* note 12.

⁸³ 147 Cong. Rec. S 1832-33 (daily ed. March 6, 2001) (emphasis added).

⁸⁴ 147 Cong. Rec. at S 1832.

⁸⁵ CRS Ergonomics Report, *supra* note 12.

⁸⁶ *Id.*

⁸⁷ P.L. 107-55, 116 Stat. 81 (March 27, 2002).

CRS-39

no later than 90 days after its date of enactment,⁸⁸ whether to introduce a CRA disapproval resolution with respect to the rules issued by the FEC on July 17, 2002.⁸⁹ The Senate sponsors believed that the new rules, which became effective on November 6, 2002, undermine the BCRA's ban on the raising and spending of soft money by federal candidates and officeholders and on national party use of soft money. Since the FEC was mandated to promulgate rules to implement the BCRA by a date certain, it could have been argued that, in contrast with the general discretion OSHA has with respect to whether to issue any ergonomics standard, if Congress disapproved the FEC's soft money rule, the agency would be obligated to undertake a new rulemaking (to be completed within a year after the disapproval resolution was signed into law) that would reflect congressional objections to the rule. At the same time, in accordance with the understanding of the Joint Statement, it would have been arguably incumbent on Congress in its debates on any such resolution to clearly identify those provisions of the rule that are objectionable as well as those that are not.

Whether this line of argument will be sufficient to withstand a challenge in the courts cannot be answered with any degree of certainty. Foreseeable obstacles may be the novelty of the issue, the amount of weight, if any, that a court will accord the post-enactment congressional explanation of the CRA, and the current inclination of the courts to give deference to the plain meaning of statutory language and to eschew legislative history. A new rule may be challenged on grounds of lack of authority as a consequence of the disapproval resolution either because Congress failed to articulate its objections to the rule, thereby providing no standards for the agency to apply in its rulemaking, or that the new rules were "substantially the same" as the old, disapproved rules and therefore invalid under the CRA.

In the future, if Congress considers a disapproval resolution, it should be mindful of the guidance provided by the Joint Statement. The Joint Statement declares that it is the congressional intent to make clear and specific identification of the options available to the agency, including identification of objectionable provisions in the proposed rule during the floor debates. In this way Congress provides an agency clear and direct guidance as to what it expects in the repromulgation process as well as a possible defense to a challenge based on the "substantially the same" language of the CRA.

Conclusion

This report identifies structural and interpretive issues affecting use of the CRA. While there have been some instances of the law apparently influencing the implementation of certain rules, the limited utilization of the formal disapproval process in the ten years since enactment has arguably reduced the threat of possible congressional scrutiny and disapproval as a factor in agency rule development. The

⁸⁸ Section 402 (c)(2).

⁸⁹ Kenneth P. Doyle, Wertheimer, Bauer Debate Move to Void Soft Money Rule Before Senate Democrats, Bureau of National Affairs, July 19, 2002. A disapproval resolution of the FEC rules was introduced in the Senate, S.J.Res. 48, on October 8, 2002, but was never acted upon by either House.

CRS-40

one instance in which an agency rule was successfully negated is likely a singular event not soon to be repeated. Presently, the Congress and the White House are in the hands of the same political party, the rules of the previous administration are no longer subject to the CRA, and the current administration appears to be establishing firm control of the agency rulemaking process through its administration of Executive Order 12,866.⁹⁰ One commentator has observed that if the perception of a rulemaking agency is that the possibility of congressional review is remote “it will discount the likelihood of congressional intervention because of the uncertainty about where Congress might stand on that rule when it is promulgated years down the road,” an attitude that is reinforced “so long as [the agency] believes that the president will support its rule.”⁹¹ Indeed, there is growing evidence that a significant number of covered rules are not being submitted for review at all. Also, a potentially effective support mechanism, the in-depth, individualized scrutiny of selected agency cost-benefit and risk assessment analyses by GAO authorized under the Truth in Regulating Act of 2000, was never implemented for lack of appropriated funds.

The CRA reflects a recognition of the need to restore the political accountability of Congress and the perception of legitimacy and competence of the administrative rulemaking process. It also rests on the understanding that broad delegations of rulemaking authority to agencies are necessary and appropriate, and will continue for the indefinite future. The Supreme Court’s most recent rejection of an attempted revival of the nondelegation doctrine⁹² adds impetus for Congress to consider several facets and ambiguities of the current mechanism. Absent review, current trends of avoidance of notice and comment rulemaking, lack of full reporting of covered rules under the CRA, intrusive judicial review, and increasing presidential control over the rulemaking process will likely continue.

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⁹¹ Seidenfeld, *supra* note 31, at 1090.

⁹² *Whitman v. American Trucking Ass’n*, 531 U.S. 457 (2001).

CRS-41

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